

Supreme

ARTICLE I, SECTION 8, CLAUSE 2, OF THE
CONSTITUTION OF THE UNITED STATES OF AMERICA
GRANTS CONGRESS THE POWER TO

REGULATE THE BANKRUPTCY AND AS THE
SUPREMACY OF THE UNITED STATES OF AMERICA
IS ESTABLISHED

AND THE POWER TO ENFORCE THE SAME BY ALL NECESSARY
MEANS

UNITED STATES OF AMERICA

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 154

ANDERSON NATIONAL BANK, SUING ON BEHALF
OF ITSELF AND ALL OTHERS SIMILARLY SITU-
ATED, APPELLANTS,

vs.

H. CLYDE REEVES, INDIVIDUALLY AND AS COM-
MISSIONER OF REVENUE OF THE STATE OF
KENTUCKY, ETC., ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF KENTUCKY

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JUDD & DETWEILER (INC.); PRINTERS, WASHINGTON, D. C., NOVEMBER 2, 1943.

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[fol. 1] **IN THE COURT OF APPEALS OF KENTUCKY**

**ANDERSON NATIONAL BANK, Suing on Behalf of Itself and
All Others Similarly Situated, Appellant,**

vs.

**H. CLYDE REEVES, Individually and as Commissioner of
Revenue of the State of Kentucky and a Member of the
Kentucky Tax Commission; C. M. C. Porter and R. L.
McFarland, Individually and as Associate Commissioner
of Revenue of the State of Kentucky and as Members of
the Kentucky Tax Commission; Hubert Meredith, Indi-
vidually and as Attorney General of the State of Ken-
tucky, Appellees**

Appeal from Franklin Circuit Court

STATEMENT ON APPEAL

1. The judgment appealed from herein was rendered on May 8, 1942 and the pages of the Record herein the judgment may be found are pages 74 to 76.

2. The Circuit Judge before whom the case was tried, is Hon. W. B. Ardery.

3. The appellant does not wish to have summons issued or a warning order made.

4. The attorney for the appellees are Hubert Meredith, Attorney General, A. E. Funk, Earl S. Wilson and R. Vincent Goodlett, Assistant Attorney Generals, Frankfort, Kentucky.

(Signed) Charles W. Milner, Leo T. Wolford, Coun-
sel for Appellant, Louisville, Kentucky.

[fol. 4] IN FRANKLIN CIRCUIT COURT

ANDERSON NATIONAL BANK, Suing on Behalf of Itself and
All Others Similarly Situated, Plaintiff,

v.

H. CLYDE REEVES, Individually and as Commissioner of
Revenue of the State of Kentucky and a Member of the
Kentucky Tax Commission; C. M. C. Porter and R. L.
McFarland, Individually and as Associate Commissioners
of Revenue of the State of Kentucky and as Members of
the Kentucky Tax Commission; Hubert Meredith, In-
dividually and as Attorney General of the State of Ken-
tucky, Defendants

BILL OF COMPLAINT IN EQUITY AND PETITION FOR DECLARATORY
JUDGMENT—Filed August 27, 1940

Plaintiff, Anderson National Bank states:

Plaintiff is a national banking association organized
under the national banking laws of the United States and
with all of the powers incident thereto. Plaintiff's principal
office and place of business is in Lawrenceburg, Anderson
County, Kentucky.

[fol. 5] The defendant, H. Clyde Reeves, is the Commis-
sioner of Revenue of the State of Kentucky, duly qualified
and acting as such and in such capacity is charged with the
administration of the Department of Revenue and specif-
ically, among other things, with the enforcement of Chapter
79 of the Acts of 1940, page 333, now Ky. St. 1605a through
1622-1, both inclusive, which is the 1940 Kentucky Escheat
Law; and which will be further referred to hereinafter. The
defendant Reeves is a member of and the chairman of the
Kentucky Tax Commission.

The defendants, C. M. Porter, and R. L. McFarland, are
members of the Kentucky Tax Commission and Associate
Commissioners of Revenue of the State of Kentucky, duly
qualified and acting as such, and in such capacity are
charged with the administration of the Department of
Revenue and specifically, among other things, with the en-
forcement of said Escheat Law.

The defendant, Hubert Meredith, is the Attorney General
of the State of Kentucky, duly qualified and acting as such,
and in such capacity is charged with the duty of enforcing

the laws of the State of Kentucky by civil and criminal proceedings and the duty of advising the several departments of the State of Kentucky, including the Department of Revenue and the Kentucky Tax Commission, of their legal rights and duties.

At its 1940 Session the General Assembly of Kentucky [fol. 6] passed Chapter 79 of the Acts of 1940, page 333, being Ky. St. 1605a to 1622-1, both inclusive, which is the 1940 Kentucky Escheat Law. Said law is unconstitutional, void and of no effect for the following, among other, reasons:

A. Under Section 3 (Ky. St. 1606) the Act provides that there shall vest in the Commonwealth (without notice or hearing or opportunity to be heard) all property having a situs in this State (a) of persons who have died without heirs or distributees, (b) which has been devised and is unclaimed for eight years, and (c) estates (other than a corporeal hereditament) which have been abandoned. This section further provides that all of such property shall be liquidated and the proceeds, less expenses of liquidation and debts, shall be paid to the Department of Revenue.

No provision is made as to who determines the facts on which such escheat or vesting of title in the Commonwealth depends. No requirement is made for any judicial proceeding or any notice to the owner or his heirs that the State is proposing to escheat his property.

B. Section 4 (Ky. St. 1607) provides that personal representatives of persons all or a part of whose estates are not distributed by will and who die without heirs shall settle their accounts within one year and pay to the Department of Revenue the proceeds of all personal estate after deducting liabilities.

[fol. 7] Again no provision is made as to who determines the facts on which such escheat or vesting of title in the Commonwealth depends. No requirement is made for any judicial proceedings or any notice to the owner's heirs that the State is proposing to escheat their property.

This section also provides that the personal representative shall take possession of and rent the real estate "until it is otherwise legally disposed of" and pay the net proceeds to the Department of Revenue.

The Act contains no provision as to how or by whom such property is or may be "legally disposed of."

C. Section 5 (Ky. St. 1608) provides that if an heir, devisee or distributee shall fail for eight years to claim his legacy, the personal representative after deducting legal liabilities shall pay such legacy "whether the same be real or personal estate and the net proceeds thereof to the Department of Revenue."

D. Section 6 (Ky. St. 1609) provides that when any person owning property or estates having a situs in this Commonwealth is not known to be living for seven successive years and neither the owner nor his heirs, etc. "can be located or proved to have been living for" seven years, such person shall be presumed to have died without heirs and both his real and personal estate shall be liquidated and the proceeds less costs of the liquidation and liabilities against [fol. 8] the estate shall be paid to the Department of Revenue.

No provision is made as to who determines the facts on which such escheat depends (the Act nowhere says that the title to such property shall vest in the Commonwealth). No requirement is made for any judicial proceedings or any notice to such person or his heirs that the State is proposing to escheat his property. No provision is made as to who takes possession of the property or who liquidates it in order to pay the proceeds to the Department of Revenue.

E. Section 7 (Ky. St. 1610) provides that when the owner of a demand deposit in a State or national bank has not within the ten preceding years (a) negotiated in writing with the bank in respect thereto, or (b) been credited with interest on the passbook or certificate of deposit on the depositor's request, or (c) had a transfer noted of record in the books of the bank, or (d) increased or decreased the amount of the deposit, "such deposit and the interest thereon shall be presumed abandoned."

There is the same provision in this section as to time deposits except that the period of time is twenty-five years instead of ten.*

* Thus, if a person owning a bank deposit has been missing for seven years and otherwise comes within the purview of Section 6 (Ky. St. 1609) above, is such deposit to be paid

[fol. 9] This section further provides that deposits of money or any other thing to secure services, etc., "shall be presumed abandoned unless claimed + by the person" within ten years after the holder was obligated to return it.

The section further provides that all dividends, monies, credits, claims and all intangible personal property whatsoever held within this Commonwealth by any person for the benefit of another "shall be presumed abandoned unless claimed by the person entitled thereto" within ten years from the time the holder was obligated to return the same.

The Act further provides that any money paid into court "shall be presumed abandoned if not claimed" within a given time.

Thus, in the case of unclaimed demand and time deposits in banks, if the owner does not do certain things within eight or twenty-five years, respectively, such deposit is presumed abandoned, whereas in the case of deposits to secure services and in all other cases where property is held for another, such property "shall be presumed abandoned unless" the owner does certain things. So that in the case of all deposits, claims, etc., except those in banks, the Act provides for an immediate presumption of abandonment [fol. 10] and escheat "unless" the owner defeats the presumption by making claim thereto within a certain time.

F. Section 8 (Ky. St. 1611) provides that it is the duty of all State and national banks, courts and everyone else holding property in any capacity that comes under the provisions of Section 7 (Ky. St. 1610) above, to report to the

to the Department of Revenue immediately or does it wait for ten years or twenty-five years as provided in Section 7 (Ky. St. 1610) just referred to above?

+ The word "claim" is defined in the Act, Section 2 (Ky. St. 1605a) as follows: "Whenever used in this Act unless the context requires otherwise the word 'claim' shall mean to demand payment or surrender of property from the person whose duty it is to pay the claimant or surrender to him the property involved."

So that a person with knowledge of his deposit may not leave the deposit for safe keeping or for the purpose of drawing interest thereon but must actually demand payment in order to avoid the confiscation of it by the State.

Department of Revenue on or before September 1st, as of July 1st, all property declared by the Act to be presumed abandoned and within four months after July 1st to turn over all property so reported to the Department of Revenue, except that if the owner or a person entitled thereto within the four months after July 1st had a written transaction of record in the books of the person or court making the report or can by other competent evidence before the Commissioner of Revenue clearly manifest knowledge of or claim to the property, it is not the duty of the person or court to surrender such property to the Department.

Thus, where a person had a demand deposit for unforeseen emergencies or carried a courtesy deposit, and where such deposits were as much as ten years old without written negotiations, additions or withdrawals, the bank under the Act would be required to report such deposits and if for any reason the depositor could not or did not within four months make some writing or an additional deposit or withdraw part of the deposit, then under the Act the bank would [fol. 11] be required under a 10% penalty to pay the money over to the State, even though the bank knew that the depositor was alive and still claiming the deposit.

G. Section 10 (Ky. St. 1613) attempts to relieve from liability the person transferring property to the Department of Revenue and provides that if this cannot be done, the Commonwealth shall reimburse such persons for all liability to the owner.

The attempt to relieve the person of liability is not effective and the provision that the Commonwealth shall reimburse the person is of doubtful, if any, value, since no provision is made as to how such claim for reimbursement shall be made or to whom it shall be made or by whom it shall be paid or how it can be enforced. In addition, this section can at any time at the will of the General Assembly be repealed.

H. Section 11 (Ky. St. 1614) provides for the presentation of claims to the Department of Revenue for property turned over to it. This section provides that the claimant "shall within fifteen (15) days after filing any claim" with the Department of Revenue publish notice of such claim in a newspaper of general *bona fide* circulation in the county in which the property was held before it was trans-

ferred to the Commonwealth and that if there be no such newspaper, notices shall be posted at the court house door and in three other conspicuous places in the county.

[fol. 12] Thus, under the Act the Commonwealth takes property without notice of any kind to the owner or claimant, whereas such owner or claimant before he can get it back is required to give widespread and conspicuous notice of his claim.

I. Section 12 (Ky. St. 1615) provides that if the claimant establishes his claim, the Commissioner of Revenue when the time for appeal or further legal procedure has expired, shall "authorize payment to him of a sum equal to the same amount which was paid into the treasury in compliance with this Act."

While the Commissioner may "authorize" payment, it is not made the duty of any person to make such payment nor is there any provision for the enforcement of such payment.

This section further provides that if a claimant is dissatisfied with the decision of the Commissioner of Revenue he may appeal from such decision to the Franklin Circuit Court and that "in any such proceeding before the Franklin Circuit Court the Commissioner of Revenue shall be made a party defendant and all other persons required by law to be made parties defendant or plaintiff and served with actual or constructive notice *in rem* or *quasi in rem* actions shall be so treated."

Thus, if a suit by the claimant is necessary to recover property the Act is careful to provide that service on all parties shall be made, whereas under Section 16 (Ky. St. [fol. 13] 1619) referred to hereinafter the Commonwealth can take such property by a mere claim and delivery suit and to which the owner or claimant is not made a party.

J. Section 13 (Ky. St. 1616) provides that whenever any property "which may be escheated" under this Act is in the hands of a United States Court, the Circuit Court in any county where such United States Court sits "shall have jurisdiction to ascertain whether an escheat has occurred and to enter a judgment of escheat in favor of the Commonwealth."

This section is pertinent in that it shows knowledge on the part of the State of the fact that a legal taking of property or escheat of it requires the ascertainment by a court of competent jurisdiction of "whether an escheat has oc-

curred" and the entry of "a judgment of escheat in favor of the Commonwealth."

The omission of any such requirement of court action, hearing and judgment concerning the taking of the other property which the Escheat Act of 1940 attempts to take under the other provisions of the Act referred to above shows that such other taking is illegal and unconstitutional.

K. Section 16 (Ky. St. 1619) provides that if any person refuses to voluntarily surrender intangible property as provided in Section 7 or 8 or if the agent of any court refuses to do so, "a proceeding may be brought on the relation of the Commissioner of Revenue as an equity action in [fol. 14] a court of competent jurisdiction to force such payment or surrender of property."

Such a suit is simply a claim and delivery suit and not a suit to ascertain the facts necessary to constitute an escheat.

Thus, under the Act the Commonwealth forcibly takes property by a mere claim and delivery suit without notice to the owner or claimant, whereas if the claimant attempts to get the property back from the Commonwealth, the Act is careful to provide who shall be the necessary defendants and for actual or constructive service on them.

This section further provides that if property is turned over to the Department of Revenue under Sections 7, 8 or 9 of the Act, the Commissioner of Revenue *may* at any time cut off the right of redemption.

L. Section 17 (Ky. St. 1620) provides that all money received by the Department of Revenue under the Act "shall be deposited with the State Treasurer and credited to the account of the General Expenditure Fund" with the proviso that 10% of such amount for the years 1940 and 1941 shall be taken from the deposit and turned over to the Department of Revenue for its own purposes.

Thus, under the Act, as to any payments made during the years 1940 and 1941 there is an immediate confiscation or forfeiture of 10% which the owner can never recover.

[fol. 15] It is the plan and purpose of the defendants and of the Commonwealth of Kentucky unless enjoined and restrained by this Court immediately and as necessity requires to spend any and all money turned over to the Department of Revenue or the State Treasurer under the Escheat Act of 1940 and not to segregate or set aside or

keep any part of such money as a trust or other fund for the benefit of the owners or claimants thereto.

M. Section 20 (1622-1) provides that any person who refuses to make a report required by the Act shall be guilty of a misdemeanor and fined from \$50.00 to \$200.00 or imprisoned from thirty days to six months, or both fined and imprisoned.

This section further provides that the Department of Revenue has power to require such reports and the surrender of the property by civil action in which case the person shall be required to pay a penalty of 10% of the amount, not to exceed \$500.00, and that any person bona fide contesting the Act may be relieved of fine or imprisonment by posting bond.

Thus, a person who has any kind of property which does or may belong to another person or in which such other person has or may have a claim, or against whom another person has or may have a claim for wages, etc., all depending on questions of both law and fact, is required by the Act under threat of fine, imprisonment and a 10% penalty to be judge and jury and not only report, but to pay over such [fol. 16] property to the Department of Revenue and all without notice to the owner or claimer of such property.

N. Under rules and regulations issued by the defendants herein, the State of Kentucky is attempting to collect unclaimed wages and other property as to which the Kentucky Statutes of Limitations have long since applied. That is, in the "Instructions" issued by the defendants herein, it is provided with reference to wages:

"* * * in reporting unclaimed wages, give the period of time the employee worked, such as 'unclaimed wages—June 1, 1910 to June 3, 1910.'"

Thus, the State of Kentucky and the defendants herein are attempting to go back to the beginning of time and confiscate any amount which any person has ever owed any other person and which amount has not been paid and regardless of whether or not the Kentucky Statutes of Limitation have already barred such claim and any property reported must under a 10% penalty be paid to the Department of Revenue.

A copy of said form of reporting abandoned property, together with the Instructions issued with reference thereto, is filed herewith as part hereof and marked Exhibit A.

The Kentucky Escheat Law of 1940 is very careful to repeal Ky. St. 1611, as follows, requiring notice, suit, publication, service, etc., etc., with reference to escheat:

"Sec. 1611. Recovery of land; parties; publication of notice.—The escheator shall institute proceedings in the name of the Commonwealth in the circuit court of the county in which land lies that has vested in the Commonwealth under the provisions of this chapter for the recovery of the same, and shall make defendants to such action all persons occupying the land, or claiming to own the same, or an interest therein known to him, and shall also cause notice of the institution of the action, together with a general description of the land, to be published for four weeks in a paper published in and having a general circulation in the state. Any person claiming an interest in the land may be made a party to the action, and the action and method of procedure shall, in all respects, be the same as in other cases for recovery of real property, except that it may be tried as an equity case."

The Kentucky Escheat Law of 1940 is very careful to *not* incorporate therein any such requirement of notice, suit, publication, service, etc., in order to effect an escheat.

As to plaintiff and the other national banks for who it sues, the Kentucky Escheat Act of 1940 (Ky. St. 1605a through 1622-1, both inclusive) is in violation of the national banking laws.

For ready reference the said Escheat Act of 1940 is attached hereto as an Appendix.

The persons required to make the report referred to in Section 8 (Ky. St. 1611) and to turn over the property referred to in Section 7 (Ky. St. 1610) above, including plaintiff and all State and national banks, are in a class and the questions involved are of a common and general interest to all persons in such class, and such persons and parties are so numerous as to make it impracticable to bring them all before the Court. Plaintiff and each of those for whom it sues have deposits and/or other property that

would or might come within the terms of the Act. The plaintiff, therefore, brings this action in its own behalf and in behalf of all State and national banks and of all other persons in said class and for the benefit of them all.

Said Escheat Act of 1940 is unconstitutional and void for the following reasons, among others, to-wit:

1. The Act is in violation of Article I, Section X, of the Constitution of the United States and of Section 19 of the Constitution of Kentucky in that it is a law impairing the obligation of contracts between the banks and their depositors.

2. The Act deprives the banks, and their depositors of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and in violation of Section 14 of the Kentucky Constitution, and it violates Sections 2 and 13 of the Kentucky Constitution for the following reasons:

(a) The banks, and other persons required to make reports and pay over to the State property or indebtedness, [fol. 19] presumed to have been abandoned, are required to determine at their peril many difficult questions of facts and law as to the application of the Act to various classes of persons, such as nonresidents, etc., and the banks, and other persons required to make such reports, are heavily penalized for failure to make such reports correctly; and they are required, at their own expense, to institute litigation, give bonds to secure the State and otherwise bear the expense not only of determining doubtful questions; but also in order to make up complicated reports, audit their records, etc., without having anything to gain for themselves and without even being permitted to charge the expense of investigation, auditing or litigation to the particular funds in question.

(b) The Act is essentially a revenue measure, the primary purpose of which is to obtain property and revenue for the State without making prior compensation therefor and it is not uniform upon all taxpayers as required by Kentucky Constitution, Section 171.

(c) The provision in the Act for repayment to the depositors and other persons whose property is confiscated by the State, and for indemnity to the persons required to

report and pay over such property to the State, are not sufficient to afford protection to such property owners or to the banks or to other persons required to report and pay over because (1) the amounts involved as to particular [fol. 20] property owners may be too small to justify making claims, publishing notices and engaging in litigation; (2) if the statute is invalid the right to indemnity and to a return of the property are likewise invalid; (3) the State may in the future fail to make appropriations for the return of such property or to provide indemnity; (4) the State may at any time repeal so much of the Act as gives a right to sue the State; and (5) the State of Kentucky is already indebted to the extent of the limit of indebtedness authorized by the Constitution of Kentucky, Section 49, to-wit, the sum of \$500,000, and any additional indebtedness incurred by the State will violate such constitutional provision.

The said Act is an attempt by the State of Kentucky to take the property of plaintiff and all others for whom it is suing for public use without due process of law and without just or any compensation therefor and in violation of the rights accruing to plaintiff and those for whom it sues by the Constitution of the State of Kentucky and by the Constitution of the United States, which rights are specifically set up and claimed by the plaintiff and those for whom it sues.

Said Act is an attempt by the State of Kentucky to deny to plaintiff and those for whom it sues the equal protection of the law in violation of the rights accruing to plaintiff and those for whom it sues by the Constitution of the State of Kentucky and by the Constitution of the United [fol. 21] States, which rights are specifically set up and claimed by the plaintiff and those for whom it sues.

Said Act is an attempt by the State of Kentucky to impair the obligations of contracts of plaintiff and those for whom it sues in violation of the rights accruing to plaintiff and those for whom it sues under the Constitution of the United States, which rights are herein specifically set up and claimed by the plaintiff and those for whom it sues.

An actual controversy exists between plaintiff and those for whom it sues and the defendants herein in that plaintiff and those for whom it sues contend that the said Act is unconstitutional, void and of no effect for the reasons hereinabove set out, and for other reasons, whereas the

defendants claim that said Act is valid and constitutional.

The defendants, unless enjoined and restrained by this Court, in order to coerce plaintiff and those for whom it sues to file the report provided for in Section 8 (Ky. St. 1611) above, and to turn over to it the money and other property referred to in Sections 7 and 8 (Ky. St. 1610 and 1611) above, without any judicial construction of the Escheat Act of 1940 and without any judicial determination as to whether such property can legally be taken from plaintiff and those for whom it sues by the State of Kentucky, will invoke and enforce against plaintiff and those for whom it sues the provisions of Section 20 of the Act (Ky. St. 1622-1) calling for fines up to \$200 and imprisonment up to six months and a 10% penalty and which said section imposes fines and penalties so grossly excessive and so ruinously expensive as to intimidate plaintiff and those for whom it sues in the legitimate operations of their business and to deny to plaintiff and those for whom it sues their day in court and to deprive plaintiff and those for whom it sues of their property without due process of law and to deny to plaintiff and those for whom it sues the equal protection of the law contrary to the Constitution of the State of Kentucky and contrary to the Fourteenth Amendment of the Constitution of the United States, all to the great and irreparable damage of plaintiff and those for whom it sues and for which they have no adequate remedy at law.

If each of the persons required to make the report under Section 8 (Ky. St. 1611) and to turn over property as provided in Sections 7 and 8 (Ky. St. 1610 and 1611) were required to file separate suits to determine the constitutionality of the Escheat Act of 1940, each of such suits would involve the same question. Therefore, it is necessary for plaintiff and those for whom it sues to go into a court of equity in a class or representative suit, both to avoid a multiplicity of suits and irreparable damages to each of them and the confiscation of their property.

The injunction sought in this bill in equity has never been asked for or refused by this or any other Court, judge or public officer.

[fol. 23] The compiling of the report called for by the defendants herein under the Escheat Act of 1940 will as to plaintiff and a very great many, if not all, of those for whom it sues, involve a very great deal of time, expense

and work, which will be wasted and of no value whatsoever if the Escheat Act of 1940 is, as plaintiff and those for whom it sues allege, unconstitutional.

A state bank under date of August 21, 1940, wrote to the defendant, H. Clyde Reeves, as follows:

"In view of the fact that the validity of the escheat law is to be tested which will require some time, we would appreciate it very much if you would grant to us an extension of time for filing the report required by law."

The said defendant, Reeves, and the Department of Revenue declined to grant such requested extension in the following reply dated August 22, 1940:

"The Department of Revenue feels that the contest of the escheats law is not sufficient reason for the granting of an extension of time for the filing of the report due thereunder.

"If any other valid and sufficient reason can be given for the Department's granting an extension to you, we will be glad to take it under consideration."

The defendants, other than the Attorney General, have announced that similar requests by any one for extensions of time until the validity of the 1940 Escheat Act can be determined, will be similarly declined.

[fol. 24] Wherefore, plaintiff and those for whom it sues pray:

1. That an injunction may issue herein perpetually enjoining and restraining the defendants and each of them, their successors in office and all other persons acting by, through or under them

(a) from requiring plaintiff and any of those for whom it sues to file with the Department of Revenue or the Commissioner of Revenue or any other department or person on or before September 1, 1940, or on or before any other time the report provided for in Section 8 of the Kentucky Escheat Act of 1940 (Ky. St. 1611);

(b) from requiring plaintiff or any of those for whom it sues to turn-over or pay to the Department of Revenue or any other department or person all or any of the property referred to in the Kentucky Escheat Act of 1940, being Ky. St. 1605a through 1622-1;

(c) from instituting any action, civil or criminal, against the plaintiff or any of those for whom it sues to require them to make said report or turn over the property called for in the Kentucky Escheat Act of 1940, being Ky. St. 1605a through 1622-1.

2. That a preliminary injunction be granted *pendente lite* for those things for which a perpetual injunction is sought [fol. 25] restraining and enjoining the defendants and each of them, their successors in office and all other persons acting, by, through or under them, until further order of this Court,

(a) from requiring plaintiff and any of those for whom it sues to file with the Department of Revenue or the Commissioner of Revenue or any other department or person on or before September 1, 1940, or on or before any other time the report provided for in Section 8 of the Kentucky Escheat Act of 1940 (Ky. St. 1611);

(b) from requiring plaintiff or any of those for whom it sues to turn over or pay to the Department of Revenue or any other department or person all or any of the property referred to in the Kentucky Escheat Act of 1940, being Ky. St. 1605a through 1622-1;

(c) from instituting any action, civil or criminal, against the plaintiff or any of those for whom it sues to require them to make said report or turn over the property called for in the Kentucky Escheat Act of 1940, being Ky. St. 1605a through 1622-1.

3. That upon final hearing The Court adjudicate the rights of the parties hereto and declare that the Kentucky Escheat Act of 1940, being Ky. St. 1605a through 1622-1, is unconstitutional, void and of no effect.

[fols. 26-27] 4. Plaintiff prays for its costs herein and all further proper, general and equitable relief to which plaintiff and those for whom it sues may be entitled.

Charles W. Milner, Leo T. Wolford, Louisville, Kentucky, Attorneys for Plaintiff.

Crawford, Middleton, Milner & Seelbach, Bruce & Bullitt,
of Counsel.

August, 1940.

[fol. 28]
Revenue Form 411
8-40 10M

EXHIBIT A TO BILL AND PETITION

Commonwealth of Kentucky
Department of Revenue
Frankfort
Report of Abandoned Property
As of July 1, 1940

Name and address of reporting agent:	Date	Leave Blank
	No. Ind. Reports	
	Remittance	

1. Name, last known address and county of residence of person or estate.	2. Description of Property Reported	3. Date Presumed Abandoned	4. Value

(Attach separate sheets of paper of the same size if additional space is required or explanation is necessary relative to a particular account.)

Affidavit

The affiant, _____, states that this report and the attached sheets list all the property now required to be reported as presumed abandoned in accordance with sections 1605a-1622, inclusive, Baldwin's 1940 Supplement to Carroll-Kentucky Statutes.

Signature

Title

Subscribed and sworn to before me by _____ this _____ day

of _____, 194 _____

Signature

Title

[fol. 29]

Instructions

This report is required to be made in compliance with sections 1605²a to 1622-1, inclusive, Baldwin's 1940 Supplement to Carroll's Kentucky Statutes, and should be completed pursuant to the following instructions:

Column 1.—Insert the name of the owner of the property or the estate, the last known address of the owner or estate, and the county of residence of the owner or estate (county not required for non-residents of the Commonwealth).

Column 2.—The description of the property must be reported in this column. Examples: For bank accounts, list the type of account, such as "time deposit" or "demand deposit"; for stocks and bonds, list the series, the classification, serial number (if any), such as "Union Pacific Railroad Company stock, 4 per cent preferred," "Anaconda Copper Mines, debentures 4½'s, 256891, 1910 series;" in reporting service deposits, give the type of deposit, such as "gas service deposits," "electric service deposit"; in reporting unclaimed wages, give the period of time the employee worked, such as "unclaimed wages—June 1, 1910, to June 3, 1910." All personal property which has been liquidated should also be fully described. For all other properties give an adequate description. Contracts, agreements or court orders should be included as a part of the description.

Column 3.—"Date presumed abandoned" is interpreted to mean, except for banks, the date the abandoning owner or legal claimant was entitled to recover the property or its equivalent. (For example, in the case of service deposits, the date would be the first date the money could have been legally claimed; for wages or salaries, it would be the date on which the payment should have been made.) Banks must give the date the last record was made at the instance of the depositor.

Column 4.—The value of the property as of July 1 should be listed. If unlisted stocks or bonds are reported, estimate their value as of July 1. In reporting money, such as bank deposits, unclaimed wages, service deposits, etc., the amount of such deposit and the accrued interest to date should be shown separately.

Property escheated pursuant to sections 1606, 1607 and 1609, Baldwin's 1940 Supplement to Carroll's Kentucky

Statutes, should be reported by writing a letter to the Department of Revenue on or before September 1, listing the information required in section 1607. Do not report such property on Revenue Form 411.

This report must be filed with the Department of Revenue in Frankfort, Kentucky, on or before September 1 following the July 1 as of which the property was presumed to have been abandoned.

[fol. 30]

APPENDIX

Acts of the General Assembly, 1940, Chap. 79 (H. B. 321).
P. 333

“AN ACT relating to all classes of property actually or presumptively subject to escheat; providing the terms upon which presumption of abandonment of property and presumption of the death of persons shall be determined; providing how and when said property may be escheated to the Commonwealth of Kentucky; providing for the reduction of all such property to cash, transferring the possession of same to the Treasurer of Kentucky; providing how any person who is legally entitled thereto may recover same from the Treasurer; providing that any person transferring property to the Commonwealth as required by this Act shall be relieved of liability to the owner thereof or reimbursed for any liability or damage incurred by complying with this Act; defining certain words; providing for reports and examination of records; providing for the administration and enforcement of this Act, and for an Assistant Attorney General as incident thereto; providing fines, penalties, and imprisonment for failure to comply with this Act; providing that if any provision of this Act shall be held unconstitutional that it is the Legislative intent that all other provisions thereof shall remain in force and effect; repealing sections 1610 to 1623, inclusive of Carroll's Kentucky Statutes, Baldwin's 1936 Revision; repealing all Acts and parts of Acts in conflict with this Act; repealing Chapter 168, Acts of the Regular Session of the 1938 General Assembly of the Commonwealth of Kentucky; and repealing, amending and reenacting sections 1606, 1607, 1608, and 1609 of Carroll's Kentucky Statutes Baldwin's 1936 Revision.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

“Sec. 1. That sections 1610 to 1623 inclusive of Carroll’s Kentucky Statutes, 1936 edition, and Chapter 168, Acts of [fol. 31] the Regular Session of the 1938 General Assembly be, and the same are hereby repealed.

“Sec. 2. (Ky. St. 1605a) Whenever used in this Act, unless the context requires otherwise, the word ‘person’ shall mean and include any individual, state and national bank, partnership, joint stock company, business, trust, association, corporation, or other form of business enterprise, including a receiver, trustee, or liquidating agent.

“Whenever used in this Act, unless the context requires otherwise, the word ‘claim’ shall mean to demand payment or surrender of property from the person whose duty it is to pay the claimant, or surrender to him the property involved.

“Sec. 3. That section 1606 of Carroll’s Kentucky Statutes, 1936 edition, be repealed, amended, and re-enacted so that when amended and re-enacted it shall read as follows:

(1606) “That part of estates or property having a situs in this Commonwealth, not disposed of by will of persons who have died, or may hereafter die without heirs or distributees entitled to the same; or which have been or may hereafter be devised to any person, or any heir or distributee or devisee of such person or of the testator, who has not claimed the same or shall not claim the same within eight (8) years after such death, shall vest in the Commonwealth, subject to all legal and equitable demands on same. All such property shall be liquidated and the proceeds thereof, less costs, fees, and expenses incidental to all legal proceedings of such liquidation shall be paid to the Department of Revenue. Any estates or property except a perfect title to a corporeal hereditament, which estates or property have been abandoned by the owner thereof, shall also vest in the Commonwealth, subject to all legal and equitable demands on same. All such property shall be liquidated and the proceeds thereof, less costs, fees, and [fol. 32] expenses incidental to all legal proceedings of such liquidation shall be paid to the Department of Revenue.

"Sec. 4. That section 1607 of Carroll's Kentucky Statutes, 1936 edition, be repealed, amended, and re-enacted so that when amended and re-enacted it shall read as follows:

(1607) "The personal representatives of persons, whose estates or a part of whose estates are not distributed by will, and who died without heirs or distributees entitled to same, shall settle their accounts within one (1) year after qualifying as such and pay over to the Department of Revenue the proceeds of all personal estate, first deducting the proper legal liabilities of the estate.

"(1) If the whole personal estate cannot be settled and the accounts closed within one (1) year, the settlement as far as practicable, shall then be made and the proceeds paid over to the Department of Revenue, and the residue shall be so settled and paid over as soon thereafter as can be properly done.

"(2) The personal representative shall take possession of the real estate of such decedent not disposed of by his will, and rent out the same from year to year until it is otherwise legally disposed of, and pay the net proceeds to the Department of Revenue.

"(3) The personal representative shall also make out and transmit to the Department of Revenue a description of the quantity, quality, and estimated value of such real estate and its probable annual profits.

"Sec. 5. That section 1608 of Carroll's Kentucky Statutes, 1936 edition, be repealed, amended, and re-enacted, so that when amended and re-enacted it shall read as follows:

[160.33]. (1608) "If any devisee or his heirs, advisee or distributee, or any heir or distributee of a testator has failed or shall hereafter fail for eight (8) years to claim his legacy the personal representative of such testator or other person having the same in possession shall, after deducting the legal liabilities thereon, pay and deliver over such legacy, whether the same be real or personal estate, and the net profits thereof to the Department of Revenue.

"Sec. 6. That section 1609 of Carroll's Kentucky Statutes, 1936 edition, be repealed, amended, and re-enacted, so

that when amended and re-enacted it shall be read as follows:

(1609) "When any person owning property or estates having a situs in this Commonwealth is not known to be living for seven (7) successive years, and neither said owner, his heirs, devisees, or distributees can be located ~~on~~ ^{proved} to have been living for seven (7) successive years, such person shall be presumed to have died without heirs, devisees, or distributees, and both his real and personal estate shall be liquidated and the proceeds, less costs incident to the liquidation and any legal proceedings, and less the liabilities which have been properly claimed and approved against same, shall be paid to the Department of Revenue.

(1610) "Sec. 7. When the owner or owners (whether such ownerships be legal, beneficial, equitable, or otherwise) of deposits payable on demand in any bank or trust company (either state or national) within this Commonwealth, have not or shall not within ten (10) successive years next preceding the date as of which reports are required to be made by section 8 of this Act, (a) negotiated in writing with the bank or trust company in respect thereto, or (b) been credited with interest on the pass book or certificate of deposit on his or their request, or (c) had a transfer, ^[fol. 34] disposition of interest, or other transaction noted of record in the books or records of such bank or trust company, or (d) increased or decreased the amount of the deposit, such deposit and the interest thereon shall be presumed abandoned.

"When the owner or owners (whether such ownerships be legal, beneficial, equitable, or otherwise) of deposits other than those payable on demand in any bank or trust company (either state or national) within this Commonwealth, have not or shall not within twenty-five (25) successive years next preceding the date as of which reports are required to be made by section 8 of this Act, (a) negotiated in writing with bank or trust company in respect thereto, or (b) been credited with interest on the passbook or certificate of deposit on his or their request, or (c) had a transfer, disposition of interest, or other transaction noted of record in the books or records of such bank or trust company, or (d) increased or decreased the amount of the deposit during

said period, such deposits and the interest thereon shall be presumed abandoned.

"All deposits of money, stocks, bonds, or other credits of any kind whatsoever made to secure payment for services rendered or to be rendered, or to guarantee the performance of services or duties, or to protect against damage or harm and the increments thereof, shall be presumed abandoned unless claimed by the person entitled thereto within ten (10) years after the occurrence of such event as would obligate the holder or depository to return the same or the equivalent thereof to the proper owner or claimant.

"All dividends, stocks, and bonds and the increments thereof, all monies and credits and the increments thereof, all claims for monies and credits and the increments thereof, and all intangible personal estate or property whatsoever and the increments thereof, held within this Commonwealth [fol. 35] by any person for the benefit of another person shall be presumed abandoned unless claimed by the beneficiary or person entitled thereto within ten (10) years from the time the holder, trustee, debtor, or other responsible person became obligated to return the same or the equivalent thereof to the proper owner or claimant. If the increments or benefits payable on any instrument are not claimed within the time and manner prescribed in this paragraph, the instruments or evidence of the debt or obligation shall likewise be presumed abandoned.

"All estate or property paid into any court of this Commonwealth for distribution and the increments thereof shall be presumed abandoned if not claimed within five (5) years after the estate was so paid into court, or as soon after said five (5) year period as all claims filed in connection therewith shall have been disallowed or settled by the court.

"None of the provisions of this Act shall apply to bonds of counties, cities, school districts, or other tax levying subdivisions of this Commonwealth.

(1611) "Sec. 8. It shall be the duty of all state and national banks, trust companies, or other persons, and courts of this Commonwealth or the agents thereof, whether holding estates or property as bailee, depository, debtor, trustee, executor, liquidator, administrator, distributor, receiver, or other capacity coming within the purview of section 7 of this Act, to report annually to the Department of Revenue as of July 1, all property held by them declared

by this Act now to be presumed abandoned, and all property which shall hereafter become presumed abandoned under the provisions of this Act. The report shall be filed in the offices of the Department of Revenue in Frankfort on or before September 1 of each year for the preceding July 1; and shall give the name of the owner, his last known address, the amount and kind of property, and such other information as the Department of Revenue may require for the administration of this Act. Such person or court as may have made report of any estate or property presumed abandoned, as required in this Act, shall, within four (4) months after July 1, turn over to the Department of Revenue all property so reported; except, that if the person making such report, or any other person or persons are able to prove by competent evidence on hearing before the Commissioner of Revenue that the owner or person entitled to the property has subsequently within said four (4) months transacted business resulting in writing of record in the books of the person or court making the report, which shows the owner or person entitled to the estate or property has knowledge thereof and still claims his legal or equitable right thereto or has by other competent evidence clearly manifested such knowledge or claim, it shall not be the duty of the person or court making such report or in possession of such property to surrender it to the Department of Revenue.

(1612) "Sec. 9. Any intangible personal estate or property required by sections 7 and 8 of this Act to be liquidated so as to permit payment thereof to the Department of Revenue, shall be surrendered to the Department of Revenue and sold by the Department of Revenue at public sale at Frankfort, or in such other city in the Commonwealth as may in its judgment afford the most favorable market for the particular property involved, to the highest bidder; provided that it may decline the highest bid and reoffer the property for sale if it deems the price offered insufficient. Such sale shall be advertised at least one week before the date of the sale in a newspaper of general bona fide circulation in the county where said property was found or abandoned, and in the county where the sale is to be made, and the sale shall be held at the courthouse door.

[fol. 37] (1613) "Sec. 10. Any person who shall transfer to the Department of Revenue, property to which the Com-

monwealth is entitled under the provisions of this Act, is hereby relieved of any liability to the owner of such property arising from such transfer; however, if any such person cannot be relieved of such liability by the provisions of this section, the Commonwealth shall reimburse such person for all liability to the owner of the property or estate or damage incurred by reason of compliance with the provisions of this Act.

(1614) "Sec. 11. Any person claiming an interest in estates or property paid or surrendered to the Commonwealth in accordance with the provisions of sections 3, 4, 5, or 6 of this Act, who was not actually served with notice and who did not appear, and whose claim was not considered during the action or at the proceedings which resulted in the payment of same to the Commonwealth, may within five (5) years after the judgment file his claim thereto with the Department of Revenue.

"Any person claiming an interest in estates or property paid or surrendered to the Commonwealth in accordance with sections 7, 8, or 9 of this Act, which was not subsequently adjudged under the procedure set out in section 16 of this Act to have been actually abandoned, or owned by a decedent who had no heir, distributee, devisee, or other person entitled under the laws of this Commonwealth relating to wills, descent and distribution, to take the legal or equitable title to such estate or property, may file his claim thereto at any time after same was paid to this Commonwealth.

"The claimant shall within fifteen (15) days after filing any claim permitted under this section publish notice of such claim in a newspaper of general bona fide circulation in the county in which the property was held before being transferred to the Commonwealth as herein provided. If there be no such newspaper, the claimant shall post such [fol. 38] notice at the courthouse door and in three other conspicuous places in said county, and shall file proof of such publication or posted notice with the Department of Revenue. No such claim shall be allowed until fifteen (15) days after proof of such notice is received by the Department of Revenue at its offices in Frankfort.

(1615) "Sec. 12. It shall be the duty of the Commissioner of Revenue to consider any claim and/or defense permitted

to be filed before it and to hear evidence in respect thereto. If the claimant establishes his claim, the Commissioner of Revenue shall, when the time for appeal or further legal procedure herein provided has expired, authorize payment to him of a sum equal to the same amount which was paid into the Treasury in compliance with this Act. The decision shall be in writing and shall state the substance of the evidence heard by the Commissioner of Revenue if a transcript thereof be not kept and such decision shall be a matter of public record.

"Any person, petitioner, or claimant dissatisfied with the decision of the Commissioner of Revenue may within sixty (60) days, appeal from such decision to the Franklin Circuit Court or file an action in said court to vacate such decision. In either event the proceedings shall be de novo, and no transcript of the record before the Commissioner of Revenue shall be required to be kept unless requested by the claimant. In any such proceeding before the Franklin Circuit Court, the Commissioner of Revenue shall be made a party defendant, and all other persons required by law to be made parties defendant or plaintiff and served with actual or constructive notice in rem or quasi in rem actions shall be so treated. Any party adversely affected by the decision of the Franklin Circuit Court may appeal to the Kentucky Court of Appeals in the manner now generally provided by law, but such appeal must be commenced within sixty (60) days after the judgment. However, the Commonwealth shall in no event be required to make a supersedeas bond. The provisions of this section which relate to the decision of the Commissioner of Revenue and appeals therefrom shall also apply to a decision of the Commissioner rendered under authority of section 8 of this Act requiring payment to the Department of Revenue over the protest of the holder or claimant of the property.

(1616) "Sec. 13. Whenever any estate or property, which may be escheated under the provisions of this Act by reason of actual abandonment, or death and for presumption of death of the owner without an heir, distributee, devisee or other person entitled to take the legal or equitable title to such estate or property under the laws of this Commonwealth relating to wills, or descent and distribution, has or shall hereafter be deposited with, or in the custody of, or under the control of any court of the United States in

and for any district within this Commonwealth, or in the custody of any depository, clerk or other officer of such court, or shall have been surrendered by such court or its officers to the United States Treasury, the circuit court of this Commonwealth in any county in which such court of the United States sits, shall have jurisdiction to ascertain whether an escheat has occurred, and to enter a judgment of escheat in favor of the Commonwealth. Provided, however, this section shall not be construed as authorizing a judgment to require such courts, officers, agents, or depositories to pay or surrender such funds to the Commonwealth on a presumption of abandonment as provided in sections 7 and 8 of this Act.

(1617) "Sec. 14. To aid in the enforcement and administration of the provisions of this Act, the Attorney General shall, with the approval of the Governor, appoint an additional Assistant Attorney General, having at least the [fol. 40] qualifications of the Sixth Assistant Attorney General, and assign him to the Department of Revenue. It shall be the special duty of such Assistant Attorney General to represent the Commonwealth at the hearings required by this Act to be held before the Commissioner of Revenue to consider claim filed pursuant to section 11 of this Act; to advise the Department of Revenue, county attorneys, and all other inquiries, with respect to questions arising under the provisions of this Act; to aid in the prosecution of all other actions or proceedings authorized by this Act when so directed by the Commissioner of Revenue or the Attorney General; and to perform such other duties as are imposed on him by any provision of this Act. Provided, however, his opinions shall be subject to the approval of the Attorney General in the same manner as is such work of other Assistant Attorneys General now established by law, and he shall also have the other ordinary powers and duties of an Assistant Attorney General.

"He shall receive a salary not exceeding four thousand dollars (\$4,000) a year, to be fixed by the Attorney General and the Commissioner of Revenue as provided by law, which shall be paid on authorization of the Commissioner of Revenue in the same manner as employees of the Department of Revenue are generally paid.

(1618) "Sec. 15. All legal proceedings to enforce sections 3, 4, 5, and 6 of this Act shall be instituted on the relation of the Commissioner of Revenue.

"It shall be the duty of the county attorney of a county in which any estate or property is located, coming within the purview of sections 3, 4, 5, or 6 of this Act, to institute such legal proceedings as are necessary to enforce the provisions of said sections and to recover such sums as are [fol. 41] due the Commonwealth thereunder. The petition and all pleadings necessary to be filed in such proceedings shall be on the relation of the Commissioner of Revenue and shall be sent to the Commissioner of Revenue for his signature and approval. The petition shall be accompanied by an affidavit of the county attorney, stating the facts on which it is based. For all other pleadings, there shall be a statement by the county attorney of the reason for the particular pleading.

"On any action or proceeding filed by a county attorney under the provisions of this Act, it shall be the duty of the Assistant Attorney General, provided for in section 14 of this Act, to offer assistance and suggestions to the county attorney in the preparation of the petition or any pleadings, and to revise and correct same as he may deem necessary, subject to the ultimate approval of the Commissioner of Revenue, when he is required to sign same.

"If the estate or property of a person coming within the purview of sections 3, 4, 5, or 6 of this Act is located in two or more counties, all such property may be included in one action or proceeding; provided, however, that the county attorneys of all counties in which such property is located may join in the prosecution of the action or proceeding, and their fees shall be determined by the amount of money derived from the property located within their respective count is when possible to determine such figure; otherwise, the courts shall determine their fees by equitable apportionment in accordance with the value of the property which is located in their respective counties.

"If the county attorney performs all the duties imposed upon him by this Act relating to enforcement of the provisions of sections 3, 4, 5, or 6, he shall be entitled to a fee of fifteen per cent (15%) of any sum recovered in such proceeding, except that the county attorney's fee shall be [fol. 42] limited to five per cent (5%) on intangible property recovered in excess of one thousand dollars (\$1,000).

"In the event that a county attorney declines to perform the duties imposed upon him by this Act, they may be performed by the Commissioner of Revenue and the county attorney shall not be entitled to any fee. The Commissioner

may, when he deems it to the best interest of the Commonwealth, institute any action authorized by this Act to be brought by the county attorney, or join the county attorney in the active prosecution of any such action. The county attorney shall be entitled to his fee in either instance if he does his duty.

“Pending the outcome of an action or court proceeding, the court may make such disposition of the land or tangible personal property involved as may seem best from the standpoints of use, rents, interest, and profits. In the event the use of the property is given to the claimant by the court, such claimant shall be held accountable for returns and profits arising from such use, if the Commonwealth be successful in such proceeding.”

(1619) “Sec. 16. In the event any person refuses to pay or surrender voluntarily intangible estate or property to the Department of Revenue, as provided in sections 7 or 8 of this Act, or if the agent of any court refuses so to do, a proceeding may be brought on the relation of the Commissioner of Revenue as an equity action in a court of competent jurisdiction to force such payment or surrender of property, and all property subject to said sections 7 and 8 may be listed and included in a single action.

“If intangible estates or property are turned over to the Department of Revenue on presumption of abandonment, in accordance with sections 7, 8, or 9 of this Act, the Commissioner of Revenue may at any subsequent time institute [fol. 43]. proceedings in a court of competent jurisdiction to establish conclusively that such estate or property was actually abandoned, or that the owner thereof is dead and there are no heirs, devisees, distributees, or any other persons entitled to succeed to the title of same.

“In the event a particular person or persons may have property coming within the purview of sections 3, 4, 5, or 6 of this Act, and also sections 7 or 8 of this Act, the actions herein required to be brought by the county attorney and the Commissioner of Revenue may be joined, but joinder is not required, and if separate actions shall be brought, they shall not be considered as coming within the rule against splitting a cause of action. The county attorney shall not be charged with the duty of enforcing sections 7, 8, 9, and 12 of this Act.

“The procedure for any and all actions or proceedings permitted or necessary under this Act to be filed in a court

of competent jurisdiction shall be the same as that now provided in Carroll's Kentucky Civil Code of Practice, unless provided differently herein, except that all such actions or proceedings shall be filed as equity actions.

(1620) "Sec. 17. All money received by the Department of Revenue under the provisions of this Act shall be deposited with the State Treasury and credited to the account of the General Expenditure Fund; provided, however, that ten per cent (10%) of such sum so received during the fiscal year beginning July 1, 1940, and ten per cent (10%) of such sum so received during the fiscal year beginning July 1, 1941, shall be added to and made a part of the appropriation available to the Department of Revenue for the respective fiscal years. After June 30, 1942, the legislature shall make provision for the administration of this Act in the regular budgetary appropriation made for the Department. [fol 44] All the expense necessary and required to be paid by the Commonwealth in administering and enforcing this Act shall be paid, out of the funds available to the Department of Revenue, and such expenses shall be paid in the same manner as other claims upon the Commonwealth are paid.

"The county attorney shall act as agent of the Department of Revenue for the collection of all judgments recovered in actions prosecuted by him under the provisions of this Act and he shall deduct the fee allowed him for his services performed pursuant to this Act, and promptly remit such collections to the Department of Revenue, with such information relating thereto as the Department may require.

(1621) "Sec. 18. Any action permitted by this Act to be brought by the Commonwealth must be brought within fifteen (15) years from the effective date of this Act or from the time when the cause of action accrued, whichever is the later date.

(1622) "Sec. 19. Any person under disability affected by this Act shall have five (5) years after the disability is removed in which to take any action or procedure or make any defense allowed to one *sui juris*.

(1622-1) "Sec. 20. The Department of Revenue, through its employees, is also authorized to examine all records of state and national banks or trust companies, corporations, companies, partnerships, agencies, and persons where there

is reason to believe that there has been or is a failure to report property which should be reported under the provisions of this Act.

"The Commissioner of Revenue shall have authority to promulgate such reasonable rules and regulations as are necessary for the enforcement of this Act, and to govern hearings provided in this Act to be held before him. Provided, however, he may delegate in writing to any regular employee of the Department of Revenue authority to perform any of the duties imposed on him by this Act except [fol. 45] ing the promulgation of rules and regulations.

"Any person, or representative thereof refusing to make any report as required by this Act, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty dollars (\$50) or more than two hundred dollars (\$200), or imprisoned not less than thirty (30) days or more than six (6) months, or both so fined and imprisoned. The Department of Revenue shall also have authority, as herein provided, to require such reports, or the surrender of such property, by civil action, including an action in the nature of a bill of discovery, in which case such person shall be required to pay a penalty equal to ten per cent (10%) of all amounts which he may ultimately be required to surrender, but in no event shall said penalty exceed five hundred dollars (\$500).

"Any person bona fide contesting the applicability of this Act to him may be relieved of the threat of any fine or penalty by posting a compliance bond in an amount and of surety sufficient to the court.

"Sec. 21. All Acts and parts of Acts in conflict with this Act are, to the extent of such conflict, hereby repealed.

"Sec. 22. It is the intent and purpose of the General Assembly of this Commonwealth of Kentucky to enact each and every provision of this Act separately, so that in the event the courts for any reason should hold any provision thereof void, or the application of any provision thereof void, then all other provisions or the application of any or all other provisions shall be deemed to remain in full force and effect; and it is hereby expressly declared that the General Assembly would have enacted any part or provisions of this Act, irrespective of any other part or provision thereof.

Approved March 1, 1940, by

Governor Johnson."

[fol. 46]

IN FRANKLIN CIRCUIT COURT

[Title omitted]

NOTICE OF MOTION FOR TEMPORARY INJUNCTION—Filed Aug.
27, 1940

The defendants, H. Clyde Reeves, individually and as Commissioner of Revenue of the State of Kentucky and a member of the Kentucky Tax Commission, C. M. C. Porter and R. L. McFarland, individually and as Associate Commissioners of Revenue of the State of Kentucky and as members of the Kentucky Tax Commission, and Hubert Meredith, individually and as Attorney General of the State of Kentucky, and each of them, will take notice that on Tuesday, August 27, 1940, at 10 A. M. in the Bourbon Circuit Court room at Paris, Kentucky, plaintiff and those for whom it sues will move the Judge of the Franklin Circuit Court to grant a temporary injunction as per copy of such motion hereto attached.

Charles W. Milner, Leo T. Wolford, Attorneys for
Plaintiff.

Notice accepted. Earl S. Wilson, Asst. Atty. General,
Atty. for Defendants.

[fol. 47]

IN FRANKLIN CIRCUIT COURT

[Title omitted]

MOTION FOR TEMPORARY INJUNCTION,—Filed Aug. 27, 1940

Plaintiff and those for whom it sues move the Court upon their verified Bill of Complaint herein and the affidavit therein contained, to grant a temporary injunction pendente lite for those things for which a perpetual injunction is sought, restraining and enjoining the defendants and each of them, their successors in office and all other persons acting by, through or under them, until further order of this Court.

(a) from requiring plaintiff and any of those for whom it sues to file with the Department of Revenue or the Commissioner of Revenue or any other department or person on or before September 1, 1940, or on or before any other

time the report provided for in Section 8 of the Kentucky Escheat Act of 1940 (Ky. St. 1611);

[fol. 48] (b) from requiring plaintiff or any of those for whom it sues to turn over or pay to the Department of Revenue or any other Department or person all or any of the property ~~referred to in~~ the Kentucky Escheat Act of 1940, being Ky. St. 1605 through 1622-1;

(c) from instituting any action, civil or criminal, against the plaintiff or any of those for whom it sues to require them to make said report or turn-over the property called for in the Kentucky Escheat Act of 1940, being Ky. St. 1605a through 1622-1.

Charles W. Milner, Leo T. Wolford, Attorneys for Plaintiff.

[fol. 49] IN FRANKLIN CIRCUIT COURT

[Title omitted]

ORDER GRANTING TEMPORARY INJUNCTION—Aug. 27, 1940

This cause coming on to be heard on the motion of plaintiff and those for whom it sues for a temporary injunction pendente lite and the Court having considered the petition and affidavit therein contained and the Court being advised,

It Is Ordered, Adjudged And Decreed that a temporary injunction issue as follows:—

1. That the defendants, H. Clyde Reeves, individually and as Commissioner of Revenue of the State of Kentucky and a member of the Kentucky Tax Commission, C. M. C. Porter and R. L. McFarland, individually and as Associate Commissioners of Revenue of the State of Kentucky and as members of the Kentucky Tax Commission, and Hubert Meredith, individually and as Attorney General of the State of Kentucky, and each of them, their successors in office and all other persons acting by, through or under [fol. 50] them, be and they are severally enjoined until further order of this Court from

(a) requiring plaintiff and any of those for whom it sues to file with the Department of Revenue or the Commissioner of Revenue or any other department or person on or before

September 1, 1940, or on or before any other time the report provided for in Section 8 of the Kentucky Escheat Act of 1940 (Ky. St. 1611);

(b) requiring plaintiff or any of those for whom it sues to turn over or pay to the Department of Revenue or any other department or person all or any of the property referred to in the Kentucky Escheat Act of 1940, being Ky. St. 1605a through 1622-1;

(c) instituting any action, civil or criminal, against the plaintiff or any of those for whom it sues to require them to make said report or turn over the property called for in the Kentucky Escheat Act of 1940, being Ky. St. 1605a through 1622-1.

2. That before this temporary injunction shall go into effect the plaintiff shall file with the Clerk of this Court bond with good and sufficient surety to be approved by the Judge of this Court in the penal sum of \$100.00 in form to be approved by the Judge of this Court, conditioned upon the proper payment to the defendants of all costs and damages which they or any of them may sustain by reason of the temporary injunction issued herein should it be determined and adjudicated upon final hearing that same was wrongfully issued and should not have been granted.

W. B. Ardery, Judge.

[fol. 50a] Bond on Injunction for \$100.00 filed Aug. 27, 1940 omitted in printing.

[fol. 51] IN FRANKLIN CIRCUIT COURT

[Title omitted]

DEMURRER—Filed September 26, 1941

Come the defendants and each of them and demur generally to plaintiff's petition herein because said petition fails to state a cause of action against the defendants, or either of them.

Wherefore, the defendants and each of them pray the judgment of the Court upon this general demurrer.

Hubert Meredith, Attorney General; A. E. Funk, Assistant Attorney General; Earl S. Wilson, Assistant Attorney General, Attorneys for Defendants.

[fol. 52]

IN FRANKLIN CIRCUIT COURT

[Title omitted]

ORDER OVERRULING DEMURRER—September 26, 1941

This cause coming on to be heard on defendants' demurrer to plaintiffs' petition and briefs having been submitted and oral argument having been heard and the Court being advised, it is hereby ordered and adjudged:

1. That said demurrer be overruled; and
2. That the defendants, having signified in open Court a desire to plead further, are hereby given fifteen days in which to further plead.

W. B. Ardery, Judge.

[fol. 53]

IN FRANKLIN CIRCUIT COURT

[Title omitted]

MOTION TO STRIKE PARTS OF PETITION—Filed September 26, 1941

Come the defendants and each of them and move the Court to strike from plaintiff's petition the following language:

1. All of the last paragraph on page 6 ending on page 7 just before the beginning of Paragraph F of said petition and all of the footnote at the bottom of page 6 of the printed petition.
2. All of the last paragraph on page 7 and ending on page 8 just before paragraph G of the printed petition.
3. All of the first paragraph on page nine of the printed petition.
4. All of the third paragraph, fourth paragraph and fifth paragraph on page 9 and ending on page 10 at the beginning of Paragraph J, of the plaintiff's petition.
5. All of the second paragraph and the third paragraph on page 10 of the petition.
6. All of the first, second, third and fifth paragraphs on page 11 of the printed petition.

[fol. 54] 8. All of the first and third paragraphs on page 12 of the printed petition, ending on page 13 at the beginning of Paragraph N.

9. All of the second paragraph on page 13 of the printed petition.

Defendants and each of them state that the paragraphs above mentioned are irrelevant and incompetent and do not in any way form a basis for an action against the defendants or either of them.

Wherefore, defendants and each of them pray that said paragraphs and each of them be stricken from the petition.

Hubert Meredith, Attorney General; A. E. Funk,
Asst. Attorney General; Earl S. Wilson, Asst. At-
torney General.

[fol. 55] IN FRANKLIN CIRCUIT COURT

[Title omitted]

ANSWER—Filed October 15, 1941

Come the defendants and each of them, and without waiving their demurrer heretofore filed, but still insisting upon same, and for answer to so much of plaintiff's petition as they are advised and deem it necessary for them to answer, deny that under the provisions of section three (Carroll's Kentucky Statutes, section 1606, 1940 Supplement) of the Acts of 1940, title to property having a situs in this State shall vest in the Commonwealth of Kentucky without notice or hearing or an opportunity to be heard; deny that the property of persons shall vest in the Commonwealth of Kentucky where said persons have died without heirs or distributees; deny that any property having a situs in this State which has been devised and unclaimed for eight years shall vest in the Commonwealth of Kentucky without a notice or hearing or an opportunity to be heard by persons claiming an interest therein; deny that property having a situs in this State or estates (other than a corporeal hereditament) which have been abandoned shall vest in the Commonwealth without notice or hearing or opportunity to be heard; The defendants and each of them further deny that no provision is made as to who determines the facts

[fol. 56] on which such escheat or vesting of title in the Commonwealth is made; deny that no requirement is made for any judicial proceeding or any notices to the owner of his heirs that the State is proposing to escheat his property; deny that no provision is made as to who takes possession of the property or who liquidates it in order to pay the proceeds to the Department of Revenue; deny that the Act contains no provisions as to whom or by whom such property is or may be legally disposed of.

Defendants and each of them deny that in the case of all deposits, claims, etc., except those in banks, the Act provides for an immediate presumption of abandonment and escheat unless the owners defeats the presumption by making claim within a certain time.

The defendants and each of them further deny that where a person has a demand deposit for unforeseen emergencies or has a courtesy deposit or where such deposits are as much as ten years old without written negotiations, additions or withdrawals, or if for any reason the depositor could not or did not make some writing or an additional deposit or withdraw part of the account, that the bank would be required, even though the bank knew the depositor was alive and still claimed the deposit, to pay the money over to the State.

The defendants and each of them deny that under section ten of the Act the attempt to relieve the person transferring property to the Department of Revenue of liability is not effective or the provision that the Commonwealth shall reimburse the person is of doubtful, if any, value; denies that no provision is made as to how such claim for reimbursement shall be made or to whom it shall be made or by whom it shall be made or how it can be enforced; deny that in addition this section can at any time, at the will of the General [fol. 57] Assembly, be repealed so as to relieve the liability of the Commonwealth of Kentucky; deny that the escheat of 1940 (Kentucky Statutes sections 1605a through 1622-1, both inclusive) is in violation of the national banking laws or any other laws; deny that said Act is unconstitutional and void; deny that said Act violates Article One, Section 10 of the Constitution of the United States, and deny that said Act violates section 19 of the Constitution of Kentucky, or that said Act is a law impairing the obligation of contracts between the bank or banks and their depositors; deny that said Act deprives the bank or its depositors of

their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, or any other provision of the Constitution of the United States, or that same violates Section 14 of the Constitution of Kentucky or sections 2 and 13 of the Constitution of Kentucky; deny that the bank or banks or other person or persons required to make reports and pay over to the State property or indebtedness presumed to have been abandoned, are required to determine at their peril many difficult questions of fact and law as to the application of the law to different classes of persons, such as non-residents and other persons; deny that the banks and other persons required to make such reports are heavily penalized for failure to make such reports correctly; deny that said banks or other persons are required at their own expense to institute litigation, to give bond to secure the State, or otherwise bear the expense of determining doubtful questions or are required to make up complicated reports, audits, etc., of their records without having anything to gain for themselves or without even being permitted to charge the expense of investigation, for auditing or for litigation to the [fol. 58] particular fund in question; deny that the Act is essentially a revenue measure; deny that the primary purpose of said Act is to obtain property and revenue for the State without making a prior compensation therefor and deny that said Act is not uniform upon all taxpayers as required under Section 171 of the Constitution of Kentucky.

The defendants and each of them further deny that the provisions of the Act for repayment to the depositors and other persons whose property is confiscated or for indemnity to the persons required to report and pay over their property to the State, are not sufficient to afford protection to such property owners or to the bank or banks or to other persons required to report and pay over, because the amounts involved as to the particular property owner may be too small to justify making claims, publishing notices and engaging in litigation, or for any other reason.

The defendants and each of them further deny that if the Act is invalid, the rights to indemnity or to a return of the property are likewise invalid; deny that the State may in the future fail to make an appropriation for the return of such property or to provide indemnity; deny that the State may at any time repeal so much of the Act as gives

the right to sue the State for any property turned over prior to such appeal; deny that the State of Kentucky is already indebted to the extent of the limit of indebtedness authorized by the Constitution of Kentucky, Section 49, to-wit, the sum of \$500,000, or any other sum, and deny that any additional indebtedness incurred by the State will violate such Constitutional provision; deny that the Act is an attempt by the State of Kentucky to take the property of plaintiff, or any of the plaintiffs, or all others for whom it is suing, for public use without due process of law or without just or any compensation; deny that the said Act [fol. 59] is in any way in violation of the rights accruing to plaintiff, or any of those sued for by him, by virtue of the Constitution of the State of Kentucky or by virtue of the Constitution of the United States; deny that said Act is an attempt by the State of Kentucky to deny to plaintiff, and all those for whom plaintiff sues, the equal protection of the law in violation of rights accruing to plaintiff, or those for whom plaintiff sues, under the Constitution of the State of Kentucky or under the Constitution of the United States of America; denies that said Act is an attempt by the State of Kentucky to impair the obligation of contracts of plaintiff, and those for whom plaintiff sues, in violation of the rights accruing to plaintiff or plaintiffs under the Constitution of the United States.

Wherefore, having fully answered, defendants and each of them pray that plaintiff's petition herein be dismissed, for its costs herein expended and for all proper and equitable relief to which defendants may appear entitled.

Hubert Meredith, Attorney General, A. E. Funk,
Ass't Attorney General, Earl S. Wilson, Ass't At-
torney General.

[fol. 60]

IN FRANKLIN CIRCUIT COURT

[Title omitted]

ORDER STRIKING PARTS OF PETITION—January 30, 1942

The defendants and each of them having moved the Court to strike certain parts of Plaintiff's petition; and the Court being advised, it is hereby ordered that said motion be sustained and that all of the paragraphs, sentences and lan-

guage of said petition objected to in said motion be stricken from the petition.

W. B. Ardery, Judge.

[fol. 61] IN FRANKLIN CIRCUIT COURT

[Title omitted]

DEMURRER TO ANSWER—Filed January 30, 1942

Plaintiff Anderson National Bank, suing on behalf of itself and all others similarly situated, demurs generally to the answer of the defendants herein because the same does not state a defense to plaintiff's cause of action herein.

Charles W. Milner, Leo T. Wolford, Attorneys for Plaintiff.

[fol. 62] IN FRANKLIN CIRCUIT COURT

[Title omitted]

ORDER SUSTAINING DEMURRER TO ANSWER AND GRANTING PERPETUAL INJUNCTION—January 30, 1942

This cause coming on to be heard on the Demurrer of Plaintiff and those for whom it sues, to the answer of the defendants herein and the Court being advised,

It Is Considered, Ordered and Adjudged that the Demurrer to said answer be, and the same is hereby sustained.

The plaintiff declining to plead further

It Is Further Considered, Ordered and Adjudged:

1. That the defendants, H. Clyde Reeves, individually and as Commissioner of Revenue of the State of Kentucky and a Member of the Kentucky Tax Commission, C. M. C. Porter and R. L. McFarland, individually and as Associate Commissioners of the State of Kentucky and as Members of the Kentucky Tax Commission, and Hubert [fol. 63] Meredith, individually and as Attorney General of the State of Kentucky and each of them, their successors in office and all other persons acting by, through or under them, be and they are severally perpetually enjoined:

a. from requiring plaintiff and any of those for whom it sues to file with the Department of Revenue or the

Commissioner of Revenue or any other department or person on or before September 1, 1940 or on or before any other time the report provided for in section 8 of the Kentucky Escheat Act of 1940 (Ky. St. 1611);

b. from requiring plaintiff or any of those for whom it sues to turn over or pay to the Department of Revenue or any other department or person all or any of the property referred to in Sections 7, 8 and 9 of the Kentucky Escheat Act of 1940, being Ky. St. 1610, 1611 and 1612;

c. from instituting any action, civil or criminal against the plaintiff or any of those for whom it sues to require them to make said report or turn over the property called for in Sections 7, 8 and 9 of the Kentucky Escheat Act of 1940, being Ky. St. 1610, 1611, and 1612.

2. That Sections 7, 8 and 9 of the Kentucky Escheat Act of 1940, being Sections 1610, 1611 and 1612 of Carroll's Kentucky Statutes, 1940 Supplement, and each of them are unconstitutional. And Sections 16 and 20 of said Act (Ky. St. 1619 and 1622-1) and each of them are unconstitutional [fol. 64] in so far as they relate the enforcement or administration of Sections 7, 8 or 9 (Ky. St. 1610, 1611 and 1612) are unconstitutional.

3. That plaintiff and those for whom it sues are entitled to recover its costs herein.

To all of which the defendants and each of them object and except and pray an appeal to the Court of Appeals, which is granted.

W. B. Ardery, Judge.

Have seen: Charles W. Milner, Leo T. Wolford, Attorneys for Plaintiff. Earl S. Wilson, Attorneys for Defendants.

[fol. 65] IN FRANKLIN CIRCUIT COURT

[Title omitted]

MINUTE ENTRY OF MOTION TO SET ASIDE ORDER OF JANUARY
30, 1942—April 13, 1942

Came defendants and filed written motion and moved the Court to set aside the order entered herein on January

30, 1942 enjoining it from enforcing the provisions of Sections 7, 8 and 9 of Chapter 89 Acts of 1940 also filed motion and moved the Court for leave to file an amended answer herein, upon which motion and each of them the Court takes time.

W. B. Ardery, Judge.

[fol. 65a] IN FRANKLIN CIRCUIT COURT

[Title omitted]

MOTION TO SET ASIDE ORDER OF JANUARY 30, 1942—Filed
April 13, 1942

Come the defendants and move the Court to set aside its order entered in this action January 30, 1942, perpetually enjoining the defendants from enforcing the provisions of Sections 7, 8 and 9 of Chapter 89, Acts of 1940, and so much of Sections 16 and 20 of said Act as relate to the enforcement and administration of said Sections 7, 8 and 9, and as ground therefor state that Chapter 79 of the Acts of 1940 was amended by House Bill 331 enacted by the 1942 General Assembly, which was approved and signed by the Governor March 11, 1942, and that said amended Chapter is constitutional.

Earl S. Wilson, R. Vincent Goodlett, Counsel for
Defendants.

[fol. 66] IN FRANKLIN CIRCUIT COURT

[Title omitted]

MOTION FOR LEAVE TO FILE AMENDED ANSWER—Filed April
13, 1942

Come the defendants, and move the Court for leave to file their amended answer.

R. Vincent Goodlett, Earl S. Wilson, Counsel for
Defendants.

[fol. 67] IN FRANKLIN CIRCUIT COURT

[Title omitted]

ORDER GRANTING LEAVE TO FILE AMENDED ANSWER—April
16, 1942

Come the defendants this day and tender and offer to file their amended-answer; and the Court being advised, orders that same be filed and made a part of the record.

This 16th day of April, 1942.

W. B. Ardery, Judge Franklin Circuit Court.

By agreement of parties this cause is set for hearing on Thursday, April 23, 1942.

[fol. 68] IN FRANKLIN CIRCUIT COURT

[Title omitted]

AMENDED ANSWER—Filed April 16, 1942

Come the defendants, by leave of court, and file this their amended answer and adopt and incorporate herein all the allegations of their answer and further allege; that the General Assembly of the Regular Session of 1942 enacted House Bill 331 which was signed and approved by the Governor on March 11, 1942; that said bill amended section 8, Chapter 79, Acts 1940; that said Act is in words and figures as follows:

“An Act to amend Section 8, Chapter 79, Acts 1940.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Sec. 1. That section 8, Chapter 79, Acts 1940 is amended to read as follows:

[fol. 69] “It shall be the duty of all state and national banks, trust companies, or other persons, and courts of this Commonwealth or the agents thereof, whether holding estates or property as bailee, depository, debtor, trustee, executor, liquidator, administrator, distributor, receiver, or in any other capacity coming within the purview of section 7 of this Act, to report annually to the Department as of

July 1, all property held by them declared by this Act to be presumed abandoned. The report shall be filed in the offices of the Department on or before September 1, of each year for the preceding July 1, and shall give the name of the owner, his last known address, the amount and kind of property, and such other information as the Department may require for the administration of this Act. The report shall be made in duplicate; the original shall be retained by the Department, and the copy shall be mailed to the sheriff of the county where the property is located or held. It shall be the duty of the sheriff to post said copy on the court house door or the court house bulletin board. The sheriff shall immediately certify in writing to the Department the date when said copy was posted. Said copy must be posted on or before October 1 of the year when it is made, and shall be constructive notice to all interested parties and shall be in addition to any other notice provided by statute or existing as a matter of law. Any person who has made a report of any estate or property presumed abandoned, as required by this Act, shall, between November 1 and November 15 of each year, turn over to the Department all property so reported; but if the person making the report or the owner of the property shall certify to the Department by sworn statement that any or all of the statutory conditions necessary to create a presumption of abandonment no longer exists or never did exist, or [fol. 70] shall certify the existence of any fact or circumstance which has a substantial tendency to rebut such presumption, then, the person reporting or holding the property shall not be required to turn the property over to the Department except on order of court. No person shall be required to surrender any property on a presumption of abandonment to the Department if the period of time provided by any statute of limitation applicable to the owner's rights as against the holder has expired unless the court orders him to do so. If a person files an action in court claiming any property which has been reported under the provisions of this Act, the person reporting or holding such property shall be under no duty while any such action is pending to turn the property over to the Department, but shall have the duty of notifying the Department of the pendency of such action.

"The person reporting or holding the property or any claimant thereof shall always have the right to a judicial

determination of his rights under this Act and nothing therein shall be construed otherwise; and the Commonwealth may institute an action to recover such property as is presumed abandoned whether it has been reported or not and may include in one petition all such property within the jurisdiction of the court in which the action is brought provided the property of different persons is set out in separate paragraphs.

"Sec. 2. If the Kentucky Revised Statutes are enacted at the present session of the General Assembly, section one of this Act shall, upon the taking effect of the Kentucky Revised Statutes, be substituted in place of KRS 393.110, and shall thereafter be treated as an amendment of KRS 393.110, rather than an amendment to section 8 of Chapter [fol. 71] 79 of the Acts of 1940."

That on January 30, 1942 this court entered an order sustaining plaintiff's demurrer to defendants' answer on the ground that sections 7, 8, and 9 of Chapter 79, Acts 1940 were unconstitutional and that so much of sections 16 and 20 of said Act as relate to the enforcement and administration of said sections 7, 8 and 9 were also unconstitutional; and that the court perpetually enjoined the defendants from enforcing said sections;

That the ground on which the sections of the 1940 Act were held unconstitutional was that the Act did not provide due process of law in that insufficient notice was given to those affected by said sections;

That the 1940 Act as amended by the 1942 General Assembly unquestionably provides sufficient notice to meet all constitutional requirements.

Wherefore defendants, having answered, pray that Chapter 79, Acts 1940 as amended be held constitutional and that the plaintiff's petition be dismissed, and for their costs herein expended and for all proper legal and equitable relief to which defendants may appear entitled.

[fol. 72]

IN FRANKLIN CIRCUIT COURT

[Title omitted]

DEMURRER TO AMENDED ANSWER—Filed April, 23, 1942

Plaintiff, Anderson National Bank, suing on behalf of itself and all others similarly situated, demurs generally to

the amended-answer of the defendants herein and to the answer of the defendants herein because the same do not state a defense to plaintiff's cause of action herein.

Charles W. Milner, Leo T. Wolford, Attorneys for Plaintiff.

[fol. 73] IN FRANKLIN CIRCUIT COURT

[Title omitted]

MINUTE ENTRY OF HEARING ON DEMURRER—April 23, 1942

Plaintiff filed herein a general demurrer to defendants amended-answer and said demurrer being heard by the Court and the parties directed to file briefs thereon within the next ten days if they so desired.

[fol. 74] IN FRANKLIN CIRCUIT COURT

[Title omitted]

ORDER OVERRULING DEMURRER TO AMENDED ANSWER AND GRANTING PERPETUAL INJUNCTION—May 8, 1942

This cause coming on to be heard on the Demurrer of plaintiff and those for whom it sues, to the Amended answer of the Defendants herein and to the Answer of the defendants herein as amended and the Court being advised,

It Is Considered, Ordered And Adjudged that the Demurrer to said Amended Answer and to said Answer as amended be and the same is hereby overruled.

The plaintiff and the defendants declining to plead further

It Is Further Considered, Ordered And Adjudged:—

1. That the Order heretofore entered on January 30, 1942, be and the same is hereby set aside.

[fol. 75] 2. That the defendants, H. Clyde Reeves, individually and as Commissioner of Revenue of the State of Kentucky and a Member of the Kentucky Tax Commission, C. M. C. Porter and R. L. McFarland, individually and as Associate Commissioners of the State of Kentucky and as Members of the Kentucky Tax Commission, and Hubert

Meredith, individually and Attorney General of the State of Kentucky, and each of them, their successors in office and all other persons acting by, through or under them, be and they are severally perpetually enjoined from requiring plaintiff or any of those for whom it sues to turn over or pay to the Department of Revenue or any other Department or person all or any of the property referred to in Secs. 7, 8 and 9 of Ch. 79, Acts 1940, being the Kentucky Escheat Act of 1940, (Ky. St. 1610, 1611, and 1612) and/or the property referred to in House Bill 331, Regular Session 1942, which amends Sec. 8, Ch. 79, Acts 1940, without first obtaining an order or judgment of a court of competent jurisdiction requiring the delivery of such property.

3. This injunction is granted for the reason that the following parts of Sec. 8, Ch. 79, Acts of 1940, as amended by House Bill 331, Regular Session 1942, are unconstitutional:

(a) that part which requires a turning over of property to the Department of Revenue without an order or judgment of a court of competent jurisdiction;

(b) that part of said section which provides that the copy of the report required to be posted on the Court House door or bulletin board "shall be constructive notice to all interested parties;"

(c) other provisions of Ch. 79, Acts of 1940, as amended by House Bill 331, Regular Session 1942, in so far as they relate to the enforcement of the unconstitutional [fol. 76] part of House Bill 331 set out in Subsection

(a) above.

4. The temporary injunction entered in this cause of action on the 27th day of August, 1940, is hereby dissolved and this cause is dismissed from the docket.

5. Plaintiff and those for whom it sues object and except to so much of the above order as holds

a. That deposits made prior to the effective date of Ch. 79, Acts of 1940, as amended by House Bill 331, Regular Session 1942, are subject to Ch. 79, of the Acts of 1940 or House Bill 331, Regular Session 1942.

b. That deposits in a national bank can be presumed abandoned or can be taken over by the State of Kentucky by court order or otherwise because the owner or

owners of said deposit have not for any length of time (1) negotiated in writing with the bank in respect thereto, or (2) been credited with interest on the pass book or certificate of deposit on his or their request, or (3) had a transfer, disposition of interest or other transaction noted of record in the books or records of such bank, or (4) increased or decreased the amount of such deposit during said period.

c. That plaintiff and those for whom it sues are required to file the report provided for in Sec. 8 of Ch. 79, Acts of 1940, and/or the report provided for in the House Bill 331, Regular Session 1942, and pray an appeal to the Court of Appeals, which is granted.

6. Defendants object and except to so much of this judgment as holds any part of Ch. 79, Acts of 1940, as amended [fol. 77] by House Bill 331, Regular Session 1942, unconstitutional and enjoins defendants from enforcing same. Defendants pray an appeal to the Court of Appeals, which is hereby granted.

W. B. Ardery, Judge.

R. Vincent Goodlett, Earl S. Wilson, Attorneys for Defendant. _____, _____, Attorneys for Plaintiff.

[fol. 78]

IN FRANKLIN CIRCUIT COURT

[Title omitted]

MOTION TO EXTEND ORDER OF MAY 8, 1942 AND ORDER OVER-
RULING SAME—Filed July 3, 1942

The plaintiff and all others similarly situated on whose behalf this action is prosecuted, move the Court for an order extending the Order of May 8, 1942, herein and clarifying the same and for the purpose of declaring and adjudging: (a) whether or not deposits in banks made prior to the effective date of Ch. 79, Acts of 1940, as amended by House Bill 331, Regular Session 1942, are subject to Ch. 79 of the Acts of 1940 or House Bill 331; and (b) whether or not deposits in national banks can be presumed abandoned or can be taken over by the State of Kentucky by court order or otherwise because the owner or owners of such deposits have not for any length of time (1) negotiated in writing with the bank in respect thereto or (2) been credited with interest on the passbook or certificate of deposit at his or

[fol. 79] their request, or (3) had a transfer, disposition of interest or other transaction noted of record on the books or records of such bank, or (4) increased or decreased the amount of such deposit during the said or any period; (c) whether or not plaintiff and others for whom it sues are required to file the report provided by section 8 of Ch. 79, Acts of 1940 and/or the report provided for in such House Bill 331, Regular Session 1942.

Charles W. Milner, Leo T. Wolford, Counsel for the Plaintiff.

This motion is now overruled, to which the plaintiff excepts July 3, 1942.

W. B. Ardery, Judge.

[fol. 80]

IN FRANKLIN CIRCUIT COURT

[Title omitted]

ORDER EXTENDING AND CLARIFYING ORDER OF MAY 8, 1942

This day came the plaintiff, Anderson National Bank, on behalf of itself and all others similarly situated, and filed its motion herein to extend the Order of May 8, 1942 for the purpose of clarifying the same; and the Court being advised

It Is Considered, Ordered and Adjudged

That such motion be, and it is hereby sustained; and the Court hereby extends such May 8, 1942 Order in order to clarify the same and hereby adjudges and declares:

(a) That deposits made prior to the effective date of Ch. 79, Acts of 1940, as amended by House Bill 331, Regular Session 1942, are subject to Ch. 79 of the Acts of 1940 or House Bill 331, Regular Session 1942.

(b) That national banks as well as state banks are subject to the provisions of sections 7, 8 and 9 of Ch. 79, Acts [fol. 81] 1940 as amended, and deposits in national banks can be presumed abandoned and can be taken over by the State of Kentucky by court order at the times and under the conditions outlined in section 7 of such Act.

(c) That the plaintiff and all others similarly situated for whose benefit this suit is brought, are required to file the reports provided for in section 8 of Ch. 79, Acts of 1940

and/or the report provided for in House Bill 331, Regular Session 1942 of the Kentucky Legislature.

The plaintiff on behalf of itself and all others similarly situated for whose benefit it sues herein, object and except to the Court's declaration and judgment set out in the foregoing paragraphs (a), (b) and (c), and each of them; and prays an appeal to the Court of Appeals, which is hereby granted; and it appearing to the Court that the ends of justice so require

It Is Further Ordered That the May 8, 1942 Order is modified in respect of the paragraph setting aside the temporary injunction entered hereon on August 27, 1940, and such temporary injunction, insofar as it enjoins the defendants from requiring any reports to be filed under the statutes above referred to, by the plaintiff, or by any of the persons similarly situated on whose behalf it sues herein, is hereby continued during the pendency of the appeal, and the defendants, and each of them, are enjoined during such time from requiring any of such reports to be filed.

[fols. 82-83] Supersedeas bond on appeal omitted in printing.

[fol. 84] IN FRANKLIN CIRCUIT COURT

[Title omitted]

SUPERSEDEAS—July 3, 1943

I do certify that an appeal has been granted by the Franklin Circuit Court from a judgment rendered at its April Term, 1942 in favor of H. Clyde Reeves, Com. et al., Appellees against Anderson National Bank, et al., Appellants for filing of reports pursuant to Sec. 8 Ch. 79 Acts 1940, &c., and that a supersedeas bond has been executed. Therefore, the appellee and all others are commanded to stay proceedings on the judgment above recited.

Witness my hand as Clerk of said Court, this 3rd day of July, 1942.

Kelly C. Smither, C. F. C. C., by — —, D. C.

In House

Regular Session, 1942

House Bill No. 331

Tuesday, February 17, 1942

Mr. J. Lee Moore introduced the following bill, which was ordered to be printed and referred to the committee on

AN ACT to amend section 8, Chapter 79, Acts 1940.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Sec. 1. That section 8, Chapter 79, Acts 1940 is amended to read as

follows:

It shall be the duty of all state and national banks, trust companies, or other persons, and courts of this Commonwealth or the agents thereof, whether holding estates or property as bailee, depository, debtor, trustee, executor, liquidator, administrator, distributor, receiver, or in any other capacity coming within the purview of section 7 of this Act, to report annually to the Department as of July 1, all property held by them declared by this Act to be presumed abandoned. The report shall be filed in the offices of the Department on or before September 1 of each year for the preceding July 1, and shall give the name of the owner, his last known address, the amount and kind of property, and such other information as the Department may require for the administration of this Act. The report shall be made

15 in duplicate; the original shall be retained by the De-
partment, and the

[fol. 86]

16 copy shall be mailed to the sheriff of the county where
the property is

17 located or held. It shall be the duty of the sheriff to
post said copy on

18 the court house door or the court house bulletin board.
The sheriff

19 shall immediately certify in writing to the Department
the date when

20 said copy was posted. Said copy must be posted on or
before October 1

21 of the year when it is made, and shall be constructive
notice to all in-

22 terested parties and shall be in addition to any other
notice provided by

23 statute or existing as a matter of law. Any person who
has made a

24 report of any estate or property presumed abandoned,
as required by

25 this Act, shall, between November 1 and November 15
of each year, turn

26 over to the Department all property so reported; but
if the person

27 making the report or the owner of the property shall
certify to the

28 Department by sworn statement that any or all of the
statutory condi-

29 tions necessary to create a presumption of abandon-
ment no longer exist

30 or never did exist, or shall certify the existence of any
fact or circum-

31 stance which has a substantial tendency to rebut such
presumption,

32 then, the person reporting or holding the property shall
not be required

33 to turn the property over to the Department except on
order of court.

34 No person shall be required to surrender any property
on a presump-

35 tion of abandonment to the Department if the period of
time provided

36 by any statute of limitation applicable to the owner's
 37 rights as against
 38 the holder has expired unless the court orders him to
 39 do so. If a per-
 40 son files an action in court claiming any property which
 41 has been re-
 42 ported under the provisions of this Act, the person re-
 43 porting or holding
 44 such property shall be under no duty while any such
 45 action is pending
 46 to turn the property over to the Department, but shall
 47 have the duty of
 48 notifying the Department of the pendency of such
 49 action.
 50 The person reporting or holding the property or any
 claimant
 thereof shall always have the right to a judicial deter-
 mination of his
 rights under this Act and nothing therein shall be con-
 strued otherwise;

[fol. 87]

46 and the Commonwealth may institute an action to re-
 47 cover such prop-
 48 erty as is presumed abandoned whether it has been re-
 49 ported or not
 50 and may include in one petition all such property within
 the jurisdic-
 tion of the court in which the action is brought pro-
 vided the property
 of different persons is set out in separate paragraphs.

§ 2 If the Kentucky Revised Statutes are enacted at
 the present
 2 session of the General Assembly, section one of this Act
 shall, upon
 3 the taking effect of the Kentucky Revised Statutes, be
 substituted in
 4 place of KRS 393.110, and shall thereafter be treated
 as an amend-
 5 ment to KRS 393.110 rather than an amendment to sec-
 tion 8 of Chap-
 6 ter 79 of the Acts of 1940.

[fol. 88] IN COURT OF APPEALS OF KENTUCKY

ANDERSON NATIONAL BANK, et al., Appellants

vs.

H. CLYDE REEVES, ETC., et al., Appellees

Appeal from a Judgment of the Franklin Circuit Court

JUDGMENT—December 18, 1942

The Court being sufficiently advised, it seems to them the judgment herein is erroneous in part.

It is therefore considered that the judgment be affirmed on the original appeal and reversed on the cross appeal with directions to enter a judgment in conformity with this opinion. An order having been entered in this Court suspending the operation of the Act during the pendency of the appeal, the Circuit Court will on return of the case to that Court, fix a date for compliance with the Act giving a reasonable time for that purpose; which is ordered to be certified to said court. Whole Court sitting except Judge Rees.

It is further considered that the appellees recover of the appellants, their costs herein expended.

[fol. 89] IN COURT OF APPEALS OF KENTUCKY

ANDERSON NATIONAL BANK, et al., Appellants,

vs.

H. CLYDE REEVES, Individually and as Commissioner of Revenue, Appellee

Appeal from Franklin Circuit Court, Hon. Wm. B. Ardery,
Judge

OPINION—December 18, 1942

Opinion by Judge Fulton

Affirming on the Original Appeal and Reversing on the
Cross Appeal

This appeal brings in question the correctness of a judgment holding valid certain parts of Chap. 79 of the Acts of

1940 (K. R. S. 393.010 et seq.) as amended by Chap. 156 of the Acts of 1942, dealing with escheats and with the disposition of certain classes of property declared to be presumed abandoned. By the cross appeal it is sought to reverse the judgment in so far as it adjudged certain portions of the same Acts invalid.

[fol. 90] By sections 3 to 6 of the Act inclusive (K. R. S. sections 393.020, 393.030, 393.040 and 393.050) certain classes of property are made subject to escheat and it is made the duty of the Commissioner of Revenue to institute proceedings to vest title to such property in the Commonwealth, the procedure to be in accordance with the Civil Code. Where title to such property is vested in the Commonwealth pursuant to such proceedings, any person claiming an interest therein, and who was not actually served with notice and did not appear in the proceedings, may within five years after the judgment file his claim with the Department of Revenue. Appropriate procedure is provided for the prosecution of such claims and right of appeal is given to the Franklin Circuit Court and to this court. These portions of the Act are not in controversy although it is suggested by appellants that the entire Act should be declared invalid. They are mentioned, however, for the purpose of giving a general idea as to the scope of the Act.

So far as material to this controversy section 7 of the Act (K. R. S. 393.060 and 393.070) provides in substance:

(1) That where the owner of bank deposits payable on demand has not for ten successive years next preceding the date for making reports as required by the Act (a) negotiated in writing with the bank or trust company concerning it, or (b) been credited with interest on the pass book or certificate of deposit on his request, or (c) had a transfer, distribution of interest, or other transaction noted of record in the books or records of the bank or trust company, or (d) increased or decreased the amount of deposit, such deposits shall be presumed abandoned.

(2) The same presumption of abandonment arises with respect to deposits not payable on demand except that the period of time is twenty five years instead of ten.

Section 8 (K. R. S. 393.110) provides in substance that all persons holding property declared to be presumed

abandoned must report same to the Department of Revenue annually as of July 1, the report being due on or before September 1 of each year. A copy of the report is required to be posted on the courthouse door or bulletin board on or before October 1 and it is provided that such publication "shall be constructive notice to all interested parties and shall be in addition to any other notice provided by statute or existing as a matter of law". The person reporting the property is required to turn it over to the Department of Revenue between November 1 and November 15 except that "if the person making the report or the owner of the property shall certify to the Department by sworn statement that any or all of the statutory conditions necessary to create a presumption of abandonment no longer exists or never did exist or shall certify the existence of any fact or circumstance which has a substantial tendency to rebut such presumption, then the person reporting or holding the property [fol. 92] shall not be required to turn the property over to the Department except on order of court * * *. The person reporting or holding the property or any claimant thereof shall always have the right to judicial determination of his rights under this Act and nothing therein shall be construed otherwise; and the Commonwealth may institute an action to recover such property as is presumed abandoned whether it has been reported or not * * *".

Section 17 (K. R. S. 393.250) provides that all monies received by the Department of Revenue under the provisions of the Act must be deposited with the State Treasurer and credited to the account of the General Expenditure Fund.

Section 11 (K. R. S. 393.140) provides that any person claiming an interest in any property turned over to the state on the ground that it was presumed abandoned (provided it was not subsequently adjudged to have been actually abandoned) may claim it "at any time after same was paid to this Commonwealth"; and, even where actual abandonment was adjudged subsequent to payment to the state, any person claiming an interest, who was not actually served with notice and who did not appear, and whose claim was not considered during the proceedings, may within five years after the judgment file his claim with the Department.

Section 12 (K. R. S. 393.140) provides that if a claimant establishes his right to property presumed abandoned the Commissioner of Revenue must authorize payment to him

[fol. 93] of a sum "equal to the same amount which was paid in to the State Treasury in compliance with this Act".

The claimant is required to publish notice of his claim, within fifteen days after filing it, in a newspaper in the county in which the property was held before being transferred to the Commonwealth.

Section 10 (K. R. S. 393.130) provides: "Any person who transfers to the department property to which the state is entitled under this chapter shall be relieved of any liability to the owner arising from that transfer. The state shall reimburse any person who cannot be relieved of such liability by this section for all liability to the owner of the property or estate or damage incurred by reason of compliance with this chapter."

Section 16 (K. R. S. 393.230) provides that if any one refuses to pay or surrender property presumed abandoned to the Department as required by the Act, an equitable proceeding may be brought on relation of the Commissioner to force payment or surrender. It is further provided that if property is turned over to the Department on presumption of abandonment the Commissioner may at any subsequent time institute proceedings to establish conclusively that it was *actually* abandoned, or that the owner has died and there is no person entitled to it. It is also provided in this section that all actions mentioned under the Act shall be filed as equity actions and follow the procedure provided by the Civil Code of Practice, unless otherwise provided.

[fol. 94] This action was filed under the Declaratory Judgment Act by the Anderson National Bank, suing on behalf of itself and all others similarly situated and on behalf of depositors in banks, to test the validity of the Act and an injunction was sought to prevent the appellees from enforcing it—the appellees do not question the right of appellants to challenge the validity of the Act in the representative status assumed.

The trial court adjudged that the part of the Act requiring a voluntary delivery of the property to the state was unconstitutional because of the absence of provision for adequate notice to the owners of the property. Accordingly, the appellees were enjoined from insisting on or accepting a delivery of property presumed abandoned without first filing a suit and procuring a judgment for delivery thereof. It was adjudged that the Act was valid in so far as it required reports of property presumed abandoned and

in so far as it authorized the filing of actions to compel the surrender of property declared to be presumed abandoned. Accordingly, the trial court declined to enjoin appellees from requiring reports of property presumed abandoned and also declined to enjoin appellees from filing suits to recover property presumed abandoned, whether reported or not.

Appellants question the correctness of the judgment in holding the indicated portions of the Act valid and the appellees, by cross appeal, seek a reversal of the judgment [fol. 95] in so far as it holds any part of the Act unconstitutional or enjoins enforcement thereof.

Appellants advance the propositions 1) that the provisions of the Act requiring delivery to the State of deposits declared to be presumed abandoned constitute, in effect, an attempted escheat of such deposits, which is invalid because of the absence of notice and judicial determination, 2) that even if valid as to deposits made subsequent to the Act such provisions are ineffective as to prior deposits because, when so applied, such provisions impair the obligation of the contract of deposit, and 3) that in any event such provisions, even though valid as to state banks, are invalid as to national banks. These propositions will be considered in the order named.

Appellants' brief contains an elaborate and scholarly treatise on the origin, history and purposes of prior escheat laws of this state as a basis for their argument that the Act is unconstitutional in so far as it requires a delivery to the state of deposits declared to be presumed abandoned without a judicial determination to that effect made after adequate notice. And, were we dealing with an out and out escheat act, their argument would be most persuasive—we would unhesitatingly say that there can be no escheat except pursuant to judicial determination made after legal notice.

But such is not the case, notwithstanding appellants' vehement insistence to the contrary and notwithstanding the fact that the title of the Act recites that it [fol. 96] relates to property actually or presumptively subject to escheat. Certain parts of the Act, as indicated above, do relate to out and out escheat but before title can become vested in the state judicial determination is necessary and such determination must be made after adequate

notice since the proceedings are required to be according to the Civil Code.

But the portions of the Act dealing with dormant bank deposits do not provide for a seizure of the deposits and vesting of title or ownership in the state but merely for a transfer of property which may later be adjudged to be subject to escheat, and these provisions are for the benefit and protection of both the depositors and the state. As said by the Supreme Court in *Provident Institution for Savings v. Malone*, 221 U. S. 660, 31 S. Ct. 661, 55 L. Ed. 899, 31 L. R. M. (N. S.) 1129, in discussing a somewhat similar statute, "the statute proceeds on the general principle that corporations may become involved, or may be dissolved; or that, after long lapses of time, changes may occur which would require someone to look after the rights of the depositor. The statute deals with accounts of an absent owner, who has so long failed to exercise any act or ownership as to raise the presumption that he has abandoned his property. And if abandoned, it should be preserved until he or his representative appear to claim it; or, failing that, until it should be escheated to the state. The right and power so to legislate is undoubted."

[fol. 97] The good faith of the Legislature cannot be questioned and it is to be assumed that the Act was for the protection of the depositors as well as for the benefit of the state. That this is a justifiable assumption is clearly revealed in the provision giving the depositor (and this, of course, includes his legal representatives) the right, without limit of time, to make a claim and receive a return of the deposit provided there has not been a judicial determination of actual abandonment—and even after such judicial determination five years is given for the same purpose to any person who was not actually served with notice and did not appear in the proceedings.

In this respect both the rights of the depositor and the bank are fully protected by giving to the depositor a right of action against the state, which is conclusively presumed always to be able to pay, and by the provision relieving the bank of liability to the depositor upon compliance with the Act, fortified by the further provision for reimbursement to the bank by the state for any liability incurred by reason of compliance with the Act. The mere taking away of the depositor's right of action against the bank constitutes no substantial deprivation of property when, in lieu

thereof, he is afforded an action against the Commonwealth, the most perfect of all protection.

Nor does the requirement that the owner making claim must publish notice of his claim in a newspaper within fifteen days after filing it impose such a burden as to constitute a substantial deprivation. This is a reasonable requirement and is for the benefit of depositors whose deposits have been turned over to the state. Publicity is thus given to such claims in order that the true owners may be put on notice if a false claim is made.

It is our conclusion that the controversial portions of the Act are reasonable (as to the time provided as well as to the procedure) and that they would not constitute a deprivation of property without due process of law in violation of the Constitution of the United States even in the absence of the provision requiring notice to be posted at the courthouse door. Accordingly, it becomes unnecessary to discuss the sufficiency of such notice.

The conclusion we have reached is fully supported by *Comth. of Pennsylvania v. Dollar Savings Bank*, 259 Pa. 138, 102 Atl. 559, 1 A. L. R. 1048; *State v. Security Sav. Bank*,—Calif. App.—, 154 Pa. 1070; *Provident Institution for Savings v. Malone*, supra, and *Brookline Borough Gas Co., v. Bennett*, 227 N. Y. S. 203. The latter case upheld a similar act dealing with consumer deposits with utility companies (a class of property within the purview of the presumptive abandonment provision of the act in question), but the legal questions involved were identical with ones confronting us here.

It is the contention of appellants that even though the Act be held valid it can apply only to deposits made after its effective date since its application to deposits made [fol. 99] prior thereto would result in impairment of the contract between the depositor and the bank in violation of section 19 of the Constitution of Kentucky which prohibits the enactment of any law impairing the obligation of contracts. It is not argued that such application of the Act would result in violation of the contract clause of the Federal Constitution since this question was laid to rest by the Supreme Court in *Provident Institution for Savings v. Malone*, supra and *Security Sav. Bank v. Calif.*, 263 U. S. 282, 68 L. Ed. 306, wherein it was held that such statutes are not violative of the contract clause. These decisions are binding on us as to the federal question but not on the ques-

tion of application of the Constitution of this state. *Glenn et al v. Field Packing Co.*, 290 U. S. 177.

In support of their contention appellants rely on *Bank of Louisville v. Board of Trustees of Public Schools*, 83 Ky. 219, 5 S. W. 735 and *Louisville School Board v. Bank of Kentucky*, 86 Ky. 150, 5 S. W. 739. In each of these cases the statutes in question attempted to vest in the school board title to bank deposits of persons who were absent from the state for eight years and who had not exercised any control over the deposits during that time. It was provided that the school board should be liable to the owner of the deposit, if he should later claim it, *but that no such liability should attach to the state*. In each case it was held that the deposit created a contract between the depositor and the bank by which the latter acquired the right to retain, use and control the money until it was returned to [fol. 100] the depositor on his demand and that the statutes were void because they impaired the obligation of the contract from the standpoint of both the bank and the depositor.

A careful analysis of those opinions, reveals, however, that the underlying basis of the court's conclusion was the absence of perfect protection to the depositor and the bank. The opinion in the former case, on which the latter is based, is threaded through with comments on the failure of the statute to give the depositor, in lieu of his right of action against the bank, the substantial remedy of looking to the state for reimbursement and on its failure to give the bank any substantial remedy since it was left with no remedy except that of looking to the school board for reimbursement in the event it was compelled to account for the deposits. It is doubtful, to say the least, that the court would have reached the conclusion it did had the statute afforded to both a depositor and the bank the same perfect protection as that afforded by the Act here involved.

In any event, we think the correct conclusion was reached by the Supreme Court in the two cases referred to. It seems so clear as to require little discussion that there is no substantial impairment of the contract from the depositor's standpoint since his deposit is returnable to him by the state at any time he files a claim therefor. The argument as to impairment of the contract from the bank's standpoint was effectively answered by the Supreme Court [fol. 101] in *Security Saving Bank v. Calif.*, *supra*, in these

words: "The contract of deposit does not give the banks a tontine right to retain the money in the event that it is not called for by the depositor. It gives the bank merely the right to use the depositor's money until called for by him or some other person duly authorized. If the deposit is turned over to the state, in obedience to a valid law, the obligation of the bank to the depositor is discharged."

It is our conclusion that the parts of the Act requiring a delivery of deposits declared to be presumed abandoned to the Department of Revenue are valid in their application to deposits made both prior and subsequent to the effective date of the Act.

There is little appeal in the insistence of appellants that if the strict letter of the decisions in *Bank of Louisville v. Board of Trustees of Public Schools* and *Louisville School Board v. Bank of Kentucky*, *supra*, is not followed our decision should be made prospective in accord with the policy adopted in *Payne v. City of Covington*, 276 Ky. 380, 123 S. W. (2d) 1045, of affording protection to those who have acted in reliance on opinions of this court and whose rights might be adversely affected by a change of decision, since, as indicated above, no substantial impairment of any right of either depositors or banks is effected by the Act.

[fol. 102] The question of validity of the Act as applied to national banks must be approached in the light of the limitations applicable to state legislation affecting such institutions. National banks are amenable to state laws as are other institutions if such laws do not interfere with their functions in such manner as to conflict with the general objects and purposes of the National Banking Act. *First National Bank of Elizabethtown v. Com.*, 187 Ky. 151, 219 S. W. 175; *McClellan v. Chipman*, 164 U. S. 347, 41 L. Ed. 461; *First National Bank of San Jose v. Calif.*, 262 U. S. 366, 67 L. Ed. 1030. The burden placed on national banks of making the report of such deposits as the Act declares to be presumed abandoned is not an unwarranted interference. *Waite v. Dowley*, 94 U. S. 527, 24 L. Ed. 181. But, as said in *First National Bank of San Jose v. Calif.*, *supra*, "any attempt by a state to define their duties or control the conduct of their affairs is void whenever it conflicts with the laws of the United States or frustrates the purposes of the national legislation or impairs the efficiency of the bank to discharge the duties for which it was created. *Davis v.*

Elmira Sav. Bank, 161 U. S. 275, 40 L. Ed. 700, 16 Sup. Ct. Rep. 502."

Appellants insist that the case just quoted from is conclusive as to the invalidity of the Act in its application to national banks. In that case was involved the validity of California statutes as so applied. The statutes declared that deposits in bank to the credit of depositors who for more [fol. 103] than twenty years had not made a deposit or withdrawn any part of the deposit and where neither the depositor nor any claimant had filed any notice with the bank showing his present residence, should *escheat* to the state. The court, in commenting on the opinion of the Supreme Court of California affirming a judgment directing the payment of such deposits to the state, pointed out that the California court had declined to express an opinion as to whether the judgment operated as a present escheat of the rights of the depositor or whether the depositor still had the right to prosecute an action to obtain payment of the deposit from the state. Therefore, in discussing the case, the Supreme Court treated the California statutes as statutes of escheat or confiscation and held them void as being a regulation of national banks to such an extent as to tend to frustrate the purposes and objects of national legislation with respect to such banks. This was the reason the California statutes were held to be invalid as to national banks and not, as suggested by appellees, the fact that the statutes impaired the obligation of the contract of deposit. Analysis of the opinion reveals, however, that the only undue interference of the statutes with national banks was embodied in one sentence of the opinion as follows: "The success of almost all commercial banks depends upon their ability to obtain loans from depositors, and these might well hesitate to subject their funds to possible confiscation." [fol. 104] Thus it seems that the California statutes were held invalid as to national banks because they were deemed by the court to be *escheat* statutes confiscating the deposits solely by reason of *dormancy*. The comment of the court on the failure of the California court to express an opinion on the right of the depositor to secure a return of the deposit is significant. Thus, while this case unquestionably decided that the California statutes were invalid as to national banks and while this decision was reaffirmed as to the particular California statutes in the latter case of *Security Sav. Bank v. California*, *supra*, we do not feel that it is

controlling as to the act in controversy since the Act differs from the California statutes in that no escheat is declared by reason of mere dormancy—the Act is one pursuant to which mere custody, as distinguished from title, is vested in the state by reason of dormancy and is not one of confiscation having the tendency to cause depositors to hesitate to make deposits in national banks. And, since the confiscatory feature, which the Supreme Court had in mind as being the feature of the California statutes which tended to bring about an undue interference with national banks, is absent from the present Act, it does not appear to us that the case is controlling of the question now presented.

It is true that the Supreme Court of Tennessee in *American National Bank of Nashville v. Clarke*, Supt. of Banks, 175 Tenn. 480, 135 S. W. (2d) 935 and the United States Circuit Court of Appeals for the Sixth Circuit in *Star, Atty. Gen. v. O'Connor; Comptroller, et al.*, 118 F. (2d) 548, relying on the authority of the case under discussion, held somewhat similar statutes of Tennessee and Michigan invalid as to national banks but it seems to us that those cases [fol. 105] fail to give full consideration to the fact that the Supreme Court pointed out that the undue interference of the California statutes with national banks was brought about by the confiscatory nature of the statutes in providing out and out escheat by reason of mere dormancy. It is significant, though, that the opinion in the Sixth Circuit case did touch lightly on this aspect of the San Jose Bank case as is revealed by the remark that "the Michigan statutes resemble the California Act in being closer akin to illegitimate laws of forfeiture than to legitimate laws of escheat."

Since the act in controversy does not provide for an escheat of deposits by reason of mere dormancy, as did the California statutes, (title being vested in the state only after judicial determination of *actual* abandonment), and since the depositor may at any time before actual abandonment is adjudged (and five years thereafter if he was not served with actual notice) secure a return of his deposit from the state, it is our opinion that the Act has no tendency to cause depositors to hesitate on account of apprehended fear of confiscation to make deposits in national banks. This being true, there is no unwarranted interference with such banks and no frustration of the purpose of national legis-

lation concerning them such as to render the Act invalid as to them.

The judgment is affirmed on the original appeal and reversed on the cross appeal with directions to enter a judgment in conformity with this opinion. An order having been entered in this court suspending the operation of the Act during the pendency of the appeal, the circuit court will, on return of the case to that court, fix a date for compliance with the Act, giving a reasonable time for that purpose.

Whole court sitting except Judge Rees.

[fols. 106-112] Attorneys for Appellants: Chas. W. Milner, Louisville, Kentucky; Leo T. Wolford, Louisville, Kentucky.

Attorneys for Appellee: Hubert Meredith, Atty. Gen., Frankfort, Kentucky; A. E. Funk, Asst. Atty. Gen., Frankfort, Kentucky; Earl Wilson, Asst. Atty. Gen., Frankfort, Kentucky; Vincent Goodlet, Frankfort, Kentucky.

IM.

[fol. 113] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

APPELLANTS' PETITION FOR REHEARING—Filed February 16, 1943

We know the Court has carefully considered this case. We also know that the Court maintains an open mind and will gladly rectify its own errors if convinced that errors exist.

For ready reference a copy of the Opinion is printed as an Appendix.

National Banks

1. The Opinion states that *First National Bank of San Jose v. California*, 262 U. S. 366, is inapplicable because of the Court's conclusion that there is a material difference between the California and Kentucky statutes. It is respectfully submitted that the Court has made a distinction where there is no difference in fact.

The California statute provided, in substance, that where deposits had been inactive for twenty years the Attorney

(Italics supplied throughout.)

General should file suit against the depositors and the bank; that there should be personal service, if possible, or by publication for four weeks; that the clerk of the court should issue a notice giving the number and style of the suit and directing it to all persons claiming an interest in the deposit; that this notice is also to be published for four weeks; that thereafter there should be a hearing in the court and a judicial decree. Thus the California statute provided that the escheat for abandonment or dormancy should take place at one time and by one court procedure.

The Kentucky statute, on the other hand, accomplishes this same result by dividing the process into two steps. That is, the Kentucky statute first requires all banks, state and national, to voluntarily turn over inactive or dormant accounts to the Department of Revenue. If the bank does not voluntarily surrender the deposit, the Department can require its surrender and the bank is required to pay 10% penalty up to \$500 (K. R. S. 393.290). The Court's conclusion is that there is no escheat of the deposits so turned over to the Department, but merely a transfer of custody. We do not agree with this conclusion for reasons that will be hereafter stated; however, for present purposes we concede the point.

[fol. 115] It is respectfully submitted that the Court's line of reasoning, *i. e.*, the alleged difference between the California and the Kentucky law has overlooked the fact that the Kentucky Act does not end with this so-called "transfer of custody." The Kentucky Act provides (K. R. S. 393.230) that after there has been this so-called "transfer of custody," the State "may at *any subsequent time institute proceedings* to establish conclusively that the property was actually abandoned." Of course, it would be conceded that after such a judgment an actual escheat takes place.

In other words, under the Kentucky Act, there is first what this Court is pleased to call a mere "transfer of custody" of a National bank deposit on account of "presumed abandonment," and fifteen minutes later the State can file suit and have actual abandonment and escheat adjudged.

Therefore, the results accomplished by the California Act and by the Kentucky Act are the same, *i. e.*, the escheat of deposits in a National Bank on account of abandonment.

or inactivity or dormancy of the deposit. In California, the escheat is by one step—suit, notice, hearing and judicial determination. In Kentucky, the same escheat is accomplished by two steps—first, the taking is sugar-coated by calling it a mere “transfer of custody,” and, second, and immediately thereafter by the suit “to establish conclusively that it was actually abandoned.”

It makes no difference to the bank, it makes no difference to the depositors and there is no difference in legal principle [fol. 116] whether the taking is all at one time or strung out into two parts.

Of course the State knew from the case of *First National Bank of San Jose v. California*, 262 U. S. 366, that the Supreme Court held that a deposit in a National bank could not be escheated because of inactivity or dormancy. It may be that the authors of the Act thought that if the escheat was accomplished in two steps they could thereby get deposits from a National bank that they could not get if only the one step was used. In other words, the authors of the Act must have thought that if they could get the National banks out of the way through a so-called “transfer of custody,” the way would then be open to escheat the deposits which by that time were in the hands of the State itself.

In escheating dormant or inactive deposits in a National bank by two steps instead of one, Kentucky is emulating the example made famous by a certain paper hanger in Europe to “take a little at a time.”

2. The Court concludes that because in *First National Bank of San Jose v. California*, 262 U. S. 366, the Supreme Court commented on the fact that the California court had declined to say whether or not the true owner or claimant of the deposit could sue and recover that therefore such owner or claimant could not recover and the Court concludes therefrom that the case was decided solely on the basis that there was confiscation because the owner could not sue to recover.

It is our position on the other hand that the Supreme Court was not interested in whether the depositor could sue and get the deposit back or not. The only thing that [fol. 117] concerned the Supreme Court was the attempt by the State of California to control how long a National bank could keep an inactive or dormant account. It was immaterial to the Supreme Court in its decision whether

the attempted control by the State was exercised by taking the deposit by escheat proceedings or the less harsh sounding phrase of "transfer of custody." This is true for two reasons:

(a) If the fact that the owner of the California deposit could not get it back was the reason for the Supreme Court decision, that Court would certainly have distinctly said so and would not have left the so-called controlling point to the surmise and conjecture that the decision was based on the inability of the depositor to get his money back. The Supreme Court said the following which is concerned only with the *taking* of deposits from a National bank regardless of whether the taking was by escheat or transfer of custody:

"Plainly, no State may prohibit national banks from accepting deposits or directly impair their efficiency in that regard. And we think, under circumstances like those here revealed, a State may not dissolve contracts of deposit even after twenty years and require national banks to pay to it the amounts then due; the settled principles stated above oppose such power.

"Does the statute conflict with the letter or general object and purposes of the legislation by Congress? Obviously, it attempts to qualify in an unusual way agreements between national banks and their customers long understood to arise when the former receive deposits under their plainly granted powers. If Calif. [fol. 118] may thus interfere other States may do likewise; and, instead of twenty years, varying limitations may be prescribed—three years perhaps, or five, or ten, or fifteen. We cannot conclude that Congress intended to permit such results. They seem incompatible with the purpose to establish a system of governmental agencies specifically empowered and expected freely to accept deposits from customers irrespective of domicile with the commonly consequent duties and liabilities. The depositors of a national bank often live in many different States and countries; and certainly it would not be an immaterial thing if the deposits of all were subject to *seizure* by the State where the bank happened to be located."

(b) This Court's Opinion holds the above Supreme Court decision in the California case inapplicable here because of this Court's conclusion that the California statute was a

confiscation statute whereas the Kentucky Statute did not affect confiscation. The Court's differentiation is summed up in the following from the Opinion (Appendix, p. 11):

" * * * Analysis of the opinion reveals, however, that the only undue interference of the statutes with national banks was embodied in one sentence of the opinion as follows: 'The success of almost all commercial banks depends upon their ability to obtain loans from depositors, and these might well hesitate to subject their funds to possible confiscation.' * * * Thus, while this case unquestionably decided that the California statutes were invalid as to national banks. * * * we do not feel that it is controlling as to the act in controversy since the Act differs from the California statutes in that no escheat is declared by reason of mere dormancy—the Act is one pursuant to which mere custody, as distinguished from title, is [fol. 119] vested in the state by reason of dormancy and is not one of confiscation having the tendency to cause depositors to hesitate to make deposits in national banks. * * *

From the above, the Court seems to be of the opinion that there is no confiscation unless there is a transfer of title. This is incorrect. Confiscation results from a taking of the use of property where there has been no transfer of title or even of possession.

"Confiscation may result from a taking of the use of property without compensation quite as well as from the taking of the title." *Chicago, R. I. & P. Ry. Co. v. U. S.*, 234 U. S. 80.

In *Securities Savings Bank v. California*, 263 U. S. 282, the Supreme Court held the same California statute valid as to State banks, and, as this Court correctly states in the instant Opinion, expressly reaffirmed the prior decision in the National Bank case (262 U. S. 366) that the California statute could not be applied to National banks.

In the *Securities Savings Bank* case, the Supreme Court clearly stated that it was not in the slightest interested or concerned with whether the depositor could get his money back or not:

p. 290. "In the opinion below it was suggested that the statute may be construed as permitting a depositor,

although named as defendant in the attorney general's suit, to make claim against the State, under § 1272, at any time within five years (or the extended period) after final judgment, if he did not appear in the suit. As no depositor had appeared, the point was not passed [fol. 120] upon; and the state court expressly left open the rights of depositors and their privies in respect to escheat. *State v. Security Savings Bank*, 186 Cal. 419, 431. *We have no occasion to consider them.*"

All Banks

3. The Opinion states (Appendix, p. 1):

"By sections 3 to 6 of the Act inclusive (K. R. S. sections 393.020, 393.030, 393.040 and 393.050) certain classes of property are made subject to escheat and it is made the duty of the Commissioner of Revenue to institute proceedings to vest title to such property in the Commonwealth, the procedure to be in accordance with the Civil Code."

and again (Appendix, p. 6):

"* * * Certain parts of the Act, as indicated above, do relate to out and out escheat but before title can become vested in the state, judicial determination is necessary * * *"

It is respectfully submitted that in the above quotations the Court has misconstrued the sections in question, and has stated what they should rather than what they do contain.

The named sections do not make it the duty of the Commissioner to institute proceedings before the property covered in the respective sections is escheated nor under the Act does title become vested in the State only after a judicial determination.

First, let us say that the word "escheat" appears only once in the Act as originally passed, and that is in Sec. 13 [fol. 121] (Acts, 1940, Ky. St. 1616). It appears only once in K. R. S., and that is in Sec. 393.170. The word appears twice in the title to the Act. We consider these sections referred to in the opinion.

For ready reference K. R. S. 393.020 is as follows:

"Property subject to escheat. If any property having situs in this state has been devised or bequeathed

to any person and is not claimed by that person or by his heirs, distributees or devisees within eight years after the death of the testator, or if the owner of any property having a situs in this state dies without heirs or distributees entitled to it and without disposing of it by will, it shall vest in the state, subject to all legal and equitable demands. Also, any property abandoned by the owner, except a perfect title to a corporeal hereditament, shall vest in the state, subject to all legal and equitable demands. Any property that vests in the state under this section *shall be liquidated*, and the proceeds, less costs, fees and expenses incidental to all legal proceedings of the liquidation *shall be paid* to the department."

Instead of there being any requirement for suit before the vesting of title or any duty of the Commissioner to bring a suit, the provision that: "Any property that vests in the State under this Section shall be liquidated and the proceeds . . . paid to the department," would certainly seem to require a voluntary surrender by whoever was in possession of the property. If the act required a suit before title vested, then who would do the liquidating to pay the proceeds to the department?

[fol. 122] K. R. S. 293.030 is in four sections as follows:

(1). *The personal representatives of a person, any part of whose property is not distributed by will, and who died without heirs or distributees entitled to it shall settle their accounts within one year after qualifying, and pay to the department the proceeds of all personal property, first deducting the proper legal liabilities of the estate.*

(2) *If the whole personal property cannot be settled, and the accounts closed within one year, the settlement as far as practicable, shall then be made and the proceeds paid to the department, and the residue shall be settled and paid as soon thereafter as can be properly done.*

(3) *The personal representative shall take possession of the real property of the decedent not disposed of by his will, and rent it out from year to year until it is otherwise legally disposed of, and pay the net proceeds to the department.*

(4) The personal representative shall also make out and transmit to the department a description of the quantity, quality, and estimated value of the real property and its probably annual profits."

Instead of any requirement of suit by the Commissioner, the above sections *require* the personal representative to turn escheated the property over to the State.

K. R. S. 393.040 is as follows:

"Procedure if legacy or devise is not claimed. If any devisee or legatee, or his heir, devisee or distributee, has failed for eight years to claim his legacy or devise, *the personal representative of the testator, or other person possessing it shall, after deducting the legal liabilities thereon, pay and deliver it, and the net profits from it to the department.*"

[fol. 123] There is nothing in the above requiring suit, but on the other hand, it is made the duty of the personal representative to voluntarily surrender it to the department.

K. R. S. 393.050 is as follows:

"Presumption of death after seven years; disposition of property. When a person owning any property having a situs in this state is not known to be living for seven successive years, and neither he nor his heirs, devisees or distributees can be located or proved to have been living for seven successive years, he shall be presumed to have died without heirs, devisees or distributees, and his property *shall be liquidated* and the proceeds, less costs incident to the liquidation and any legal proceedings, and the liabilities which have been properly claimed and approved against it, *shall be paid to the department.*"

Again there is no requirement for the suit—^{whoever} is in possession is required to liquidate the property and to pay it to the department.

In fact, under the Act, if a personal representative fails to comply with K. R. S. 393.030 and 393.040 copied above, and fails to voluntarily turn over property to the State, such personal representative is liable for a 10% penalty up to \$500, unless he pays for a bond *and in good faith contests the applicability of the statute.*

K. R. S. 393.290 provides as follows:

“393.290. Civil action to enforce production of reports, surrender of property. (1) The department may require the production of reports, or the *surrender of property* as provided in this chapter by civil action, including an action in the nature of a bill of discovery, [fol. 124] in which case the defendant shall pay a penalty equal to ten percent of all amounts that he is ultimately required to surrender. This penalty shall not exceed five hundred dollars.

“(2) Any person who in good faith contests the applicability of this chapter to him may be relieved of the threat of any penalty by posting a compliance bond in an amount and of surety sufficient to the court.”

So that, instead of any requirement in the statute for a suit and judgment before title vests in the State as to admittedly escheated property, we find a 10% penalty imposed on personal representatives and others who do not voluntarily turn such property over to the State.

In the Opinion it is stated (Appendix, p. 5):

“ * * * And, were we dealing with an out and out escheat act, their argument would be most persuasive—we would unhesitatingly say that there can be no escheat except pursuant to judicial determination made after legal notice.”

Without doubt, K. R. S. 293.030 and 293.040 copied above, require personal representatives voluntarily and without “judicial determination made after legal notice” to turn over to the Department of Revenue property that is admittedly escheated. We think the same thing is true of whoever has possession of the property referred to in K. R. S. 393.020 and 393.050, although it is not spelled out as plainly as in the first-named sections.

It was for this and other reasons that we suggested to the Court in our original brief that it would do a favor to hold the entire Act void.

[fol. 125] 4. We respectfully ask the Court to clear up a point that was referred to in our original brief, but not commented on in the Opinion. The Opinion states:

“The person reporting the property is required to turn it over to the Department of Revenue between

November 1 and November 15 except that "if the person making the report or the owner of the property shall certify to the Department by sworn statement that any or all of the statutory conditions necessary to create a presumption of abandonment no longer exists or never did exist or shall certify the existence of any fact or circumstance which has a substantial tendency to rebut such presumption, then the person reporting or holding the property shall not be required to turn the property over to the Department *except on order of court*"

Under the above quoted part of the law, if a dormant deposit has been reported to the Department, and thereafter the owner shows up, can the bank pay the depositor his money, or must the bank hold the money pending "*except on order of court.*"

5. We do not know what effect, if any, it would have on the Court's opinion, but feel an obligation to call the following to the Court's attention. That is, in the Opinion it is stated (Appendix, p. 3):

"Section 17 (K. R. S. 393.250) provides that all monies received by the Department of Revenue under the provisions of the Act must be deposited with the State Treasurer and credited to the account of the General Expenditure Fund."

Section 17 of the Act as originally passed did provide as above stated (Acts, 1940, Chap. 79, p. 333). However, [fol. 126] the "Kentucky Revised Statute, 1942" issued by the "Statute Revision Committee" omits entirely Section 17 of the original Act. Kentucky Revised Statute 393.250 nor any other of the Kentucky Revised Statutes contains any reference to Section 17 of the old Act or any provision as to what becomes of the "presumed abandoned" or any other money or property escheated or turned over to the department.

So that as the Act now stands, the money is paid to the Department of Revenue with no provision as to what happens to it thereafter—whether it is to be spent for current expenses or whether it is to be held as a trust fund for future claimants. In this connection, it should be remembered that the same thing applies, not only to bank deposits and other presumed abandoned property, but also to all

property that comes to the State under any section of the Escheat Act. This should be another good reason for holding the entire Act invalid.

6. The Opinion states:

“ * * * As said by the Supreme Court in *Provident Institution for Savings v. Malone*, 221 U. S. 660, 31 S. Ct. 661, 55 L. Ed. 899, 31 L. R. S. (N. S.) 1129, in discussing a *somewhat similar statute*, “the statute proceeds on the general principle that corporations may become involved, or may be dissolved; * * * ”

Attention is called to two matters in connection with the above quotation:

(a) Formerly the solicitude of the State for depositors because of the failure, etc., of banks might have been well [fol. 127] taken. However, as the Court judicially knows every National bank and practically, if not, every other bank is a member of the Federal Deposit Insurance Corporation under which deposits are insured or guaranteed by the Government up to \$5,000. (*Bank Deposit Insurance Act*, 12 U. S. C. A. 264, 321, 15 U. S. C. A. 606a.) In other words, the Federal Government has so taken care of depositors that the State need feel no concern for them in case a bank should fail. The reasoning of the Supreme Court in the *Provident Savings* case was correct at the time when it was enunciated prior to the Federal Deposit Insurance Corporation law, but it is no longer pertinent.

(b) The statute of Pennsylvania involved in the case of *Provident Institution for Savings* is as different from the Kentucky Act as day and night. That is, the Pennsylvania statute which is copied in a footnote to the opinion of the Supreme Court (p. 661) provides in general that the court on application of the Attorney General and “*after public notice, order and decree*” that no new deposit or withdrawal has been made for thirty years “and for which no claimant is known or the depositor of it cannot be found” shall be paid to the State to be held “subject to be repaid, * * * with interest at the rate of 3% per annum from the time when it is paid over by him to such person.” In the Kentucky Act the taking is without notice or judicial decree, and no interest is paid by the State even on savings accounts that had been earning interest. Further-

[fol. 128] more, in the Pennsylvania statute, the depositor or owner could recover the deposit and interest on it without limitation as to time.

7. The Court's Opinion lays great stress on the fact that the owner of the deposit can get it back at any time unless there has been a judicial determination of actual abandonment and within five years after such judicial determination.

This is not new in Kentucky escheat law, and does not make the present so-called "transfer of custody" any different from the Kentucky escheat law for the past 101 years.

Since 1842 the Kentucky Statutes have provided for the return of escheated property to the owner without limit as to time. In other words, the present law is not as generous as the prior laws. Under the prior laws a suit, judgment and decree were necessary for the escheat. Notwithstanding such a suit and judicial determination, the law for 101 years has given the proper owner the right to recover the property without any limit as to time, whereas under the present law if there has been a judicial determination of actual abandonment, the proper owner can only recover in five years.

DUE PROCESS OF LAW

8. This Court states in its Opinion (Appendix, pp. 7, 9):

" * * * The mere taking away of the depositor's right of action against the bank constitutes no substantial deprivation of property, when in lieu thereof, [fol. 129] he is afforded an action against the Commonwealth, the most perfect of all protection * * *

"It is our conclusion that the controversial portions of the act are reasonable (as to the time provided as well as to the procedure) and that they would not constitute a deprivation of property without due process of law in violation of the Constitution of the United States even in the absence of the provision requiring notice to be posted at the court house door. Accordingly, it becomes unnecessary to discuss the sufficiency of such notice."

By this language, the Court holds that the depositor is not deprived of his right to contract about his affairs within the meaning of the Fourteenth Amendment because his claim against the State is equally as good as his claim against the bank. Some depositors may agree with that, but others may not because there are essential differences between a claim against the State and a claim against the bank. For instance

(a) To recover money from the State requires the filing of a claim with the Department of Revenue which may be too expensive to prosecute, particularly if the amount involved is small. In contrast, the depositor can withdraw his money from the bank by simply drawing a check on the account.

(b) To recover from the State the depositor must at his own expense advertise that he is making a claim. In contrast, no such advertisement is required to collect from the bank.

[fol. 130] (c) To recover from the State he may have to appeal to the circuit court and there have a second trial *de novo*, which would not be required to collect the money from the bank.

(d) To recover the money from the State the depositor must institute the proceeding at Frankfort. In contrast, he can collect from the bank in the county where the money is deposited which ordinarily would be the county of his residence.

(e) To recover from the State the depositor is dependent upon the sufficiency of the appropriation made for the purpose of reimbursing him. No such obstacle stands in the way of his recovery from the bank.

(f) To recover from the State he faces the possible obstacle that the State may have exceeded its debt limit of \$500,000 under Ky. Const., § 49.

If the amount of money paid over to the State exceeds \$500,000 the State's obligation to return it will constitute a violation of this constitutional provision. No such obstacle stands in the way of his collecting the money from the bank.

(g) As pointed out in 6 (a) above, if the depositor is relegated to his claim against the State, he will not have

the benefit of the guaranty of bank deposits under the Federal Deposit Insurance Statute. Whether the bank is solvent or not he will have this Federal guaranty in the case of nearly all the banks in the State.

[fol. 131] It will not do to say that his claim against the State is just as good a claim as his claim against the bank of his own selection. He has a right to contract for himself concerning his own affairs.

(h) In the case of savings accounts, interest stops running after the money is taken over by the State, whereas it continues to run so long as the money is in the hands of the bank.

As said by the Supreme Court in *Wolff Co. v. Industrial Court*, 262 U. S. 522, 534, in discussing the Kansas Industrial Court Act:

"It curtails the right of the employer on the one hand, and of the employee on the other, to contract about his affairs. This is part of the liberty of the individual protected by the guaranty of the due process clause of the Fourteenth Amendment. *Meyer v. Nebraska*, Ante, 390. While there is no such thing as absolute freedom from contract, and it is subject to a variety of restraints, they must not be arbitrary or unreasonable. Freedom is the general rule, and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances."

9. It is too clear for argument that the purpose of this Act was to get revenue which the State expects to use for itself. It was not passed for the protection of the depositors.

(a) The Act was substituted for the escheat Acts formerly in effect and those former Acts were repealed by this Act.

(b) As pointed out by this Court in its opinion, the title to the Act refers to it as an escheat Act. The title should [fol. 132] be considered in determining what the Act means (*Commonwealth Life Ins. Co. v. City of Paducah*, 244 Ky. 756).

(c) As clearly demonstrated in the Briefs (Appellee's Brief, pp. 71, 83-85) the Act was sponsored, not by the

Banking Department, which would normally look after the interests of the depositors, but by the Department of Revenue.

(d) The money when received by the State is put into the general expenditure fund, according to the Act as passed (Ky. Stat. § 1620), which means that it will be used for the current expenses of the State, and not kept as a trust fund for the depositor.

(e) The money is taken over on the theory that it has been abandoned, which can only mean that the State does not expect it to be claimed. Provisions are made whereby the depositor can file a proceeding with the State Tax Commission to get his money back, but not without obstacles and great expense. No mention in the Act is made of any publication or other effort by the State to locate the depositors; and there is not even a publication or any more than a court house door notice to be given before the money is taken over. It is too clear for argument that the State proposes to take private property for public use.

10. The Act provides (K. R. S. 292.130) that:

"Any person who transfers to the department, property to which the state is entitled under this chapter shall be relieved of any liability to the owner arising from that transfer. The state shall reimburse any person who cannot be relieved of such liability [fol. 133] by this section for all liability to the owner of the property or estate or damage incurred by reason of compliance with this chapter."

The Act thus recognizes the possibility, if not the probability, that the Legislature's attempt to relieve the banks from liability is not valid. If the depositor's claim against the bank is not good because of his failure to receive a constitutional notice and hearing before his property is taken, the banks will not be relieved of liability to the depositors. But the Act does not give to the banks any right to file a claim against the Department of Revenue or to sue the State. It gives such right to "any person claiming an interest in any property paid or surrendered to the State" (K. R. S. 393.140), but it does not give such a right to the banks, nor does it authorize suits by the banks against the State. They cannot sue the State in the absence of such permission.

11. Even for a taking of property to be valid in an *in rem* action, the notice must be sufficient to make it reasonably probable that it will be communicated to the defendants in order to constitute due process. Nothing short of that will suffice (*Wachter v. Pizzutti*, 276 U. S. 13, 24; *Roller v. Holly*, 176 U. S. 398). If a notice posted at the court house door was calculated to serve that purpose, it is rather strange that such a procedure for constructive service of process has not been universally followed.

12. It will be remembered that the Kentucky Act requires banks to surrender to the State dormant or inactive bank [fol. 134] deposits without notice to the owner, hearing or judicial decree, and further and what is highly important, the Act requires this voluntary surrender under threat of a 10% penalty against the bank (K. R. S. 393.290).

The Court concludes that such taking by the State does "not constitute a deprivation of property without due process of law in violation of the Constitution of the United States":

" * * * would not constitute a deprivation of property without due process of law in violation of the Constitution of the United States even in the absence of the provision requiring notice to be posted at the courthouse door. Accordingly, it becomes unnecessary to discuss the sufficiency of such notice."

Immediately following this conclusion, the Opinion states:

"The conclusion we have reached is fully supported by *Comth. of Pennsylvania v. Dollar Savings Bank*, 259 Ps. 138, 102 Atl. 569, 1 A. L. R. 1048; *State v. Security Sav. Bank*, — Calif. App. —, 154 Pa. 1070; *Provident Institution for Savings v. Malone*, *supra*, and *Brookline Borough Gas Co. v. Bennett*, 227 N. Y. S. 203. * * *

The Court is respectfully asked to reconsider the above. A re-examination of the cases cited by the Court will show that not one of them supports the Court's conclusion. That is,

[fol. 135] (a) No statute involved in any of the cases was similar to the Kentucky statute. *Not one of the statutes imposed a penalty against the bank or utility for a failure*

to surrender and this omission of a penalty provision is highly important. Since there was no penalty the bank or utility could and did simply wait for the state to bring a suit to recover the deposit so that there actually was suit, notice and judicial decree before the state could get the money. If, in the present case no penalty was imposed on the banks for a failure to voluntarily turn over dormant or inactive accounts, we would have an altogether different situation. The Kentucky banks would simply wait for the State to bring the necessary suit which would mean a notice, hearing and judicial decree.

(b) We discuss briefly each of the cases cited by the Court:

(1) *Commonwealth of Pennsylvania v. Dollar Savings Bank*, 259 Pa. 138, 102 Atl. 569, 1 A. L. R. 1048. The Pennsylvania statute imposed no penalty for a failure to voluntarily turn over the deposit. The bank waited for the state to bring suit. Furthermore, the Pennsylvania court's decision was bottomed on the fact that each of the deposits was made *after* the passage of the Pennsylvania Escheat Act of 1872, and that, therefore, when the deposits were made it was with full knowledge of such law. The Pennsylvania court said:

p. 572. "On the pleadings at bar, there being no averment to the contrary in the affidavits of defense, ~~we must assume all the deposits in controversy~~ to [fol. 136] *have been made subsequent to 1872*; and hence that the respective depositors acted with full knowledge of the provisions of the statutes, passed in that year. . . .

"Before leaving this branch of the case, albeit defendant does not raise the point, it may be well to suggest that, *since the deposits in controversy were all made subsequent to the act of 1872, supra*, in each instance the contract of the depositary must be treated as subject to the terms of the statute here in question:"

(2) *State v. Security Savings Bank*, — Calif. —, 154 Pac. 1070. The opinion in this case is by an inferior court of California. Also, the California statute did not provide any penalty, and so the bank could and did wait for suit, notice, hearing and judicial decree.

It is worthy of note that immediately after this decision by an inferior California court the California act was amended to provide for suit, notice and judicial decree. The amended act was involved in the 262, 263 United States Supreme Court cases.

(3) *Provident Institution for Savings v. Malone*, 221 U. S. 660. It has been shown above that the statute in this Malone case required suit, notice, hearing and judicial decree which entirely differentiates it from our case.

(4) *Brookline-Borough Gas Co. v. Bennett*, 227 N. Y. S. 203.

This was a decision by an inferior court of New York, and not from the Court of Appeals of New York. Also, the New York statute *re* unclaimed utilities deposits im-[fol. 137] posed no penalty for the failure to voluntarily surrender the deposit, and so the utility could and did wait for the suit.

It will be found that the highest court of no State in the Union has approved an Act under which alleged unclaimed deposits of banks or utilities are taken by so-called transfer of custody or by escheat without notice, hearing and judicial decree.

No statute in any State in the Union attempts to take inactive, dormant or unclaimed deposits without notice, suit, hearing and judicial decree *under threat of a penalty*.

The Supreme Court in every case in which it has approved laws taking unclaimed or dormant or inactive bank deposits from State banks only has stressed the point that due process must be observed. This is found in the two Supreme Court cases relied on by this Court.

(a) *Provident Institution for Savings v. Malone*, 221 U. S. 660.

p. 664. " * * * Before the money can be turned over to the receiver general proceedings must be instituted in the Probate Court, and, under the decision of the Supreme Court of the State, personal notice must be given to the bank and citation and notice, usual in the Probate Court, published, so as to give the depositor, if living, and his heirs, if dead, opportunity to appear and be heard. Even then the property is not escheated, but deposited with the treasurer to

hold as trustee for the owner or his legal representatives, to whom it is payable when they establish their right."

[fol. 138] *Security Savings Bank v. California*, 263 U. S. 282.

p. 287. " * * * In either case the essentials of jurisdiction over the deposits are that there be seizure of the *res* at the commencement of the suit; and *reasonable notice and opportunity to be heard*. Compare *Pennoyer v. Neff*, 95 U. S. 714, 724; *Freeman v. Alderson*, 119 U. S. 485, 487; *Arndt v. Griggs*, 134 U. S. 316; *Overby v. Gordon*, 177 U. S. 214, 231. These requirements are satisfied by the procedure prescribed in the statutes of California. There is a seizure or its equivalent. And the published summons to the depositors named as *parties defendant* is supplemented by the notice directed to all claimants whomsoever. * * *

13. It is earnestly insisted that the Court has erred in holding that the requisites of due process, *i. e.*, notice, hearing and judicial decree are not necessary because of the Court's conclusion that the taking is not an "out and out escheat," but what the Court calls "merely a transfer of property." The Opinion states:

" * * * and, were we dealing with an out and out escheat act, their argument would be most persuasive—we would unhesitatingly say that there can be no escheat except pursuant to judicial determination made after legal notice.

"But such is not the case, * * *

" * * * Certain parts of the Act, as indicated above, do relate to out and out escheat but before title can become vested in the state judicial determination is necessary * * *"

Our claim of lack of due process is based on the 14th Amendment to the Federal Constitution. The Amendment does not limit the necessity for due process to those cases where there is a transfer of title. The protection of the [fol. 139] 14th Amendment is thrown around *any kind of taking*.

" * * * nor shall any state deprive any person of property without due process of law."

That a transfer of title to property is not necessary to confiscation is shown in the case of *Chicago, R. I. & P. Ry. Co. v. U. S.*, 284 U. S. 80.

p. 96. "Confiscation may result from a taking of the use of property without compensation quite as well as from the taking of the title. *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418, 458; *Reagan v. Farmer's Loan & Trust Co.*, 154 U. S. 362, 410, 412; *Chicago, M. & St. P. R. Co. v. Wisconsin*, 238 U. S. 491, 498-499. The use of railroad property is subject to public regulation, but a regulation which is so arbitrary and unreasonable as to become an infringement upon the right of ownership constitutes a violation of the due process of law clause of the Fifth Amendment.

Cummins v. Reading School District (1905), 198 U. S. 458.

Pennsylvania adopted a law relating to the grant of letters of administration upon estates of persons, presumed to be dead, by reason of long absence from their domicile.

The appointment of an administrator called for newspaper notice, a hearing in the orphans court, and a finding by the court that the legal presumption of death is made out.

[fol. 140] The Act also provided:

"Nothing in this act contained shall validate the title of any person to any money or property received as widow, next of kin, or heir of such supposed decedent, but the same may be recovered from such person in all cases in which such recovery would be had, if this Act had not been passed."

The Act further provided that before any distribution was made, the person receiving it should give security approved by the Court, to repay if the absentee was in fact alive. If security could not be given then the fund was to be retained and the interest only paid to the distributees.

Mrs. Smith had a dower interest in her husband's land for life. She had been absent for 9 years and her son applied for administration and it was granted and he collected the interest which was in arrears and gave the owner of the land a receipt in discharge.

Mrs. Smith now sued the owner of the land to recover the amount paid to the administrator during her absence.

The court in deciding that the Pennsylvania statute was not repugnant to the 14th Amendment said:

"Let it be further conceded, as we also think is essential, that a state law which did not provide adequate notice as prerequisite to the proceedings for the administration of the estate of an absentee would also be repugnant to the 14th Amendment."

The Court held that the several weeks notice provided by the Pennsylvania statute was reasonable to confer jurisdiction on the Court to make an adjudication, and affirmed a decision for the defendant.

Every rate case in which the utility claims confiscation is based on the 14th Amendment, and of course in rate cases where confiscation is alleged and frequently sustained the state utility commission or other regulatory body have not only not taken title to the utility's property, but have not even taken possession of it.

One of the latest rate cases from the Supreme Court is *Federal Power Commission, et al., v. Natural Gas Pipeline Company*, 315 U. S. 575, 62 S. Ct. Rep. 736, decided March 16, 1942. The Court said:

"By long standing usage in the field of rate regulation the 'lowest reasonable rate' is one which is not confiscatory in the constitutional sense."

In other words, the Supreme Court in the last year has reaffirmed the long-standing legal principle that confiscation and a violation of the Federal Constitution may result without a taking of title or even of possession.

It is submitted that the above quotation from the Supreme Court (294 U. S. 80, 96)—"Confiscation may result from the taking of the use or property without compensation as well as from the taking of the title"—is a complete answer to this Court's differentiation of the Supreme Court case of *First National Bank of San Jose v. California*, 262 U. S. 366.

14. The Court is respectfully asked to reconsider that part of its Opinion which holds the Act applicable to deposits heretofore made.

[fol. 142] In two cases this Court has held that this could not be done. The present opinion brushes these cases aside with the statement that "the underlying basis of the Court's conclusion was the absence of perfect protection to the depositor and to the bank."

The opinions referred to contained no such qualification. Right or wrong, this Court held in *Bank of Louisville v. Board of Trustees of Public Schools*, 83 Ky. 219, 5 S. W. 735:

"When a deposit is made in a bank a contract is created between the depositor and it, by which it acquires the right to retain, use and control the money, subject to be returned to its customer upon his demand. That moment a right vests in him to look to the bank, and to it alone, for repayment and, upon the other hand, the bank is invested with the right to hold the deposit against all others. The law then existing becomes an integral part of the contract, and creates these vested rights."

and in *Commonwealth v. Thomas' Adm'r.*, 140 Ky. 789, 131 S. W. 797:

p. 794. " . . . Therefore, though it be conceded that the contracts between the banks and their depositors should have read into them the statute concerning escheats, so as to permit the bank to comply with such statute when the facts brought the case within its terms without liability to the depositor or his heirs, it would be so only as to those deposits made subsequent to the adoption of the statute. . . . "

The Court is asked to adhere to these rules or else if it changes a rule to not do so retroactively.

[fol. 143] The concluding paragraph of the Opinion directs the Circuit Court on the return of the case to fix a reasonable time for compliance with the Act.

In the unlikely event that this Court overrules this petition for rehearing or does not give the relief asked, we respectfully ask the Court to withhold the return of the case to the Circuit Court until we can take an appeal to the Supreme Court. The appeal will be prosecuted with dispatch.

Wherefore, the Court is asked to grant this petition for rehearing and to reverse the decision of the lower court.

Respectfully submitted, Charles W. Milner, Leo T. Wolford, *Attorneys for Appellants.*

Bullitt & Middleton, *of Counsel.*

February 13, 1943.

The Court understands that this request is solely to keep the case *in statu quo* until its ultimate decision.

[fols. 143a-156] (Appendix omitted)

[fol. 157] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

ORDER OVERRULING PETITION FOR REHEARING AND STAYING
MANDATE—May 7, 1943

The Court being sufficiently advised, it is considered that the petition of appellants for a rehearing, be and the same is overruled.

It is further ordered that the mandate not issue until further ordered.

[fol. 158] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

ORDER DIRECTING ISSUANCE OF MANDATE—June 4, 1943

On the Court's own motion, mandate in foregoing case is ordered to issue.

[fol. 159] IN THE COURT OF APPEALS OF KENTUCKY

MANDATE—June 4, 1943

Appeal from a judgment of the Franklin Circuit Court.

ANDERSON NATIONAL BANK, etc., et al., Appellants,

vs.

H. CLYDE REEVES, etc., et al., Appellee

The Court being sufficiently advised, it seems to them the judgment herein is erroneous in part.

It is therefore considered that the judgment be affirmed on the original appeal and reversed on the cross appeal with directions to enter a judgment in conformity with this opinion; An order having been entered in this Court suspending the operation of the Act during the pendency of the appeal, the Circuit Court will on return of the case to that

Court, fix a date for Compliance with the Act giving a reasonable time for that purpose;

Which is ordered to be certified to said court Whole Court Sitting, except Judge Rees.

A copy—Attest:

Chas. K. O'Connell, C. C. A., by Alice G. Casey, D. C.

Issued June 4, 1943.

[fol. 160] IN FRANKLIN CIRCUIT COURT

[Title omitted]

JUDGMENT—June 4, 1943

This day came the defendants, and filed the Mandate of the Court of Appeals of Kentucky, the mandatory part of which is as follows:

“The Court being sufficiently advised, it seems to them the judgment herein is erroneous in part.

“It is therefore considered that the judgment be affirmed on the original appeal and reversed on the cross-appeal, with directions to enter the judgment in conformity with this opinion.

[fol. 161] “An order having been entered in this Court, suspending the operation of the Act during the pendency of the appeal, the Circuit Court will, on return of the case to that Court, fix a date for compliance with the Act, giving a reasonable time for that purpose; which is ordered to be certified to said Court.

“Whole Court sitting, except Judge Rees.”

Thereupon, this cause came on for hearing on the merits, out of term time by agreement of the parties, and the Court being advised, It Is Now Considered, Ordered and Adjudged, as follows, to wit:

1. That the injunction entered herein on May 8, 1942, be, and it is, vacated, set aside and held for naught.

2. That the Kentucky Escheat Act of 1940, being KRS 393.010 through 393.990 (formerly Carroll's Kentucky

Statutes 1605-a through 1622-1, as amended by Chapter 156 of the Acts of the General Assembly of 1942), as applied to the plaintiff, Anderson National Bank, suing on behalf of itself and all others similarly situated, is valid and is not in conflict with the National Banking Act, or with the Due Process Clause of the State Constitution, or of the Fourteenth Amendment of the Constitution of the United States.

3. That the plaintiff's petition herein be, and it is, dismissed.

4. That the plaintiff, Anderson National Bank, and all others similarly situated, shall have ninety (90) days from this date within which to comply with the provisions of [fol. 162] the said Kentucky Escheat Act.

5. The plaintiffs object and except to this judgment, and pray an appeal to the Court of Appeals, which is hereby granted.

W. B. Ardery, Judge Franklin Circuit Court.

[fol. 163]

[File endorsement omitted]

IN THE COURT OF APPEALS OF KENTUCKY

[Title omitted]

MOTION AS TO RECORD AND TO ADVANCE—Filed June 10, 1943

Appellant, Anderson National Bank, suing on behalf of itself and all others similarly situated, moves the Court:

1. To file the Record on this appeal with, and as a part of, the Record on the first appeal of this case to this Court;

2. To docket, advance and submit this case.

Charles W. Milner, Leo T. Wolford, Counsel for appellant.

Bullitt & Middleton, of Counsel.

Notice accepted: Earl S. Wilson, Attorney for Appellees.
June 10, 1943.

[fol. 164] IN COURT OF APPEALS OF KENTUCKY

ANDERSON NATIONAL BANK, etc., Appellant,

vs.

H. CLYDE REEVES, etc., et al., Appellees

Appeal from a Judgment of the Franklin Circuit Court

JUDGMENT—June 15, 1943

The Court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellees recover of the appellant, their costs herein expended.

[fol. 165] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

OPINION—June 15, 1943

OPINION BY CHIEF JUSTICE FULTON—AFFIRMING

This is the second appeal of this case. The opinion on the first appeal, reported in 293 Ky. 735, 170 S. W. (2d) 350, upheld the validity of the principal sections of Chap. 79 of the Acts of 1940 as amended by Chap. 156 of the Acts of 1942 (KRS 393.010 et seq.) and affirmed the judgment of the lower court on the appeal but reversed it on the cross-appeal.

On the return of the case to the lower court judgment was entered in conformity with the opinion. This appeal is from that judgment.

We are bound by the opinion on the first appeal, whether it be right or wrong, under our familiar law of the case rule. We have considered the contentions 1) that the Act in question conflicts with the National Banking Act and 2) that it is violative of the due process clause of the 14th [fol. 166] Amendment to the Federal Constitution and find the contentions without merit.

Since the judgment is in conformity with the former opinion it is affirmed.

Bullitt & Middleton, Louisville, Ky., Charles W. Milner, Louisville, Ky., Leo T. Wolford, Louisville, Ky., Attorneys for Appellant. Hubert Meredith, Attorney General, Earl S. Wilson, Assistant Attorney General, A. E. Funk, Assistant Attorney General, Attorneys for Appellees.

[fol. 167] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

PETITION FOR APPEAL FROM THE COURT OF APPEALS OF KENTUCKY TO THE SUPREME COURT OF THE UNITED STATES

To the Chief Justice of the Court of Appeals of Kentucky:

Your Petitioner, Anderson National Bank, Suing on Behalf of Itself and All Others Similarly Situated (hereinafter, called the Banks) respectfully shows:

1. The Petitioner is the appellant in the above entitled cause.

2. The appeal in such cause was from a judgment rendered in a civil action on June 4, 1943 by the Franklin Circuit Court of Kentucky against the Banks and in favor of [fol. 168] H. Clyde Reeves, Individually and as Commissioner of Revenue of the State of Kentucky and a Member of the Kentucky Tax Commission; C. M. C. Porter and R. L. McFarland, individually and as Associate Commissioners of Revenue of the State of Kentucky, and as Members of the Kentucky Tax Commission, and Hubert Meredith, Individually and as Attorney General of the State of Kentucky, the Respondents herein upon the trial of said cause.

3. On appeal by the Banks from such judgment to the Court of Appeals of Kentucky (which Court is the highest court of law and equity in the State of Kentucky in which a decision of the matter of controversy could be had), the judgment appealed from was affirmed by the final judgment entered in the Court of Appeals of Kentucky on June 15, 1943, and the opinion of such Court was filed on June 15, 1943.

4. There is error in the final judgment and the record of proceedings in such cause in the Court of Appeals of Kentucky whereby the Banks are aggrieved in that (1) there was drawn in question the validity of the Kentucky Escheat Act of 1940, being KRS 393.010 through 393.990 (formerly Carroll's Kentucky Statutes 1605-a through 1622-1, as amended by Chapter 156 of the Acts of the General Assembly of 1942), as construed by the Court of Appeals of Kentucky, (2) the Court of Appeals of Kentucky has construed such Kentucky Statutes (a) as requiring all National and State Banks in Kentucky to report to the Department of Revenue annually all demand and time deposits which have been inactive or dormant for eight and twenty-five years respectively; (b) as requiring persons holding personal property for the benefit of another which has been [Eol. 169] unclaimed for ten years to report such personal property to the Department of Revenue annually; (c) as requiring that such inactive or dormant deposits in National and State Banks and such unclaimed personal property must, under heavy penalty, be voluntarily turned over to the Department of Revenue of Kentucky without notice to the owner, suit or judicial decree and (d) that the State of Kentucky can take such inactive or dormant deposits and such other unclaimed personal property without notice to the owner, suit or judicial decree. The Court of Appeals of Kentucky held in such decision against the contention of the Banks, that such Kentucky Statutes so construed by it as to National Banks do not violate the National Banking Act and the Court of Appeals of Kentucky held in such decision against the contention of the Banks that such Kentucky Statutes so construed by it as to all banks and holders of personal presumed abandoned property do not violate the due process clause of the 14th Amendment of the Constitution of the United States; and the decision and judgment of the Court of Appeals of Kentucky sustained the right of the State to (a) take such deposits from National Banks; (b) take such deposits and such other personal property from all banks and from others without notice to the owner, suit or judicial decree, and (c) require National and State Banks and others, under heavy penalty to voluntarily turn over to the Department of Revenue of Kentucky said deposits and said personal property and such Court rendered its decision in favor of the legality and validity of such Statutes of the State of Kentucky.

[fol. 170] Wherefore, Your Petitioner, Anderson National Bank, Suing on Behalf of Itself and All Others Similarly Situated prays for the allowance of an appeal from the said Court of Appeals of Kentucky to the Supreme Court of the United States in order that such decision and judgment of the Court of Appeals of Kentucky may be examined and reversed, and it also prays that a transcript of the record, proceedings and papers in this case duly authenticated by the Clerk of the Court of Appeals of Kentucky may be sent to the Supreme Court of the United States as provided by law.

Your Petitioner, Anderson National Bank, Suing For Itself and All Others Similarly Situated further prays that the appeal herein may be a supersedeas; that an order be made fixing the security required; that on approval of such security such appeal may be allowed as a supersedeas.

The errors upon which your Petitioner claims to be entitled to an appeal are those hereinbefore indicated and which are more fully set out in the Assignment of Errors filed herein dated this 18th day of June, 1943.

Charles W. Milner, Leo T. Wolford, Counsel for Appellants and Petitioners Herein.

Bullitt and Middleton, of Counsel.

Have Seen, Earl S. Wilson, Attorney for Appellees.

[fol. 171] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

ASSIGNMENT OF ERRORS

Anderson National Bank Suing on Behalf of Itself and All Others Similarly Situated (hereinafter called the Banks), Appellants herein and as appellants to the Supreme Court of the United States from the judgment and decision heretofore entered herein assign the following errors in connection with its petition for appeal to the Supreme Court of the United States:

The Court of Appeals of Kentucky erred:

(1) In holding that the Kentucky Escheat Act of 1940, being KRS 393.010 through 393.990 (formerly Carroll's Kentucky Statutes 1605-A through 1622-1, as amended by

[fol. 172] Chapter 156 of the Acts of the General Assembly of 1942), and which provide that demand and time deposits in National and State Banks which have been dormant or inactive for ten and twenty-five years, respectively, and that all other personal property held within Kentucky by any person for the benefit of another and which has been unclaimed for a period of ten years are presumed abandoned and must be reported to the Department of Revenue of Kentucky, and, under heavy penalty, must be voluntarily turned over to the Department of Revenue, are valid and constitutional.

Q

(2) In holding that said statutes as construed by the Court of Appeals of Kentucky as requiring National Banks, under heavy penalty, to voluntarily turn over to the Department of Revenue deposits on account of inactivity or dormancy do not violate the National Banking Act.

(3) In holding that the said statutes as construed by the Court of Appeals of Kentucky as requiring all banks, under heavy penalty, to voluntarily and without suit or judicial decree turn over to the Department of Revenue deposits on account of inactivity or dormancy do not violate the due process clause of the 14th Amendment of the Constitution of the United States.

(4) In holding that said statutes as construed by the Court of Appeals as requiring all persons in Kentucky who hold personal property for the benefit of another, and which has been unclaimed for a period of ten years must, under heavy penalty, voluntarily turn over such property to the Department of Revenue without suit, notice or judicial [fol. 173] decree are not violative of the due process clause of the 14th Amendment of the Constitution of the United States.

(5) In holding that the State of Kentucky can take or escheat deposits in National Banks on account of inactivity or dormancy.

(6) In holding that the State of Kentucky can take or escheat deposits in any bank on account of inactivity or dormancy without notice to the owner of such deposits and without suit or judicial decree.

(7) In holding that the State of Kentucky can take or escheat personal property held by any person for the

benefit of another and which is claimed without notice to the owner of such property and without suit and judicial decree.

(8) In holding that the State of Kentucky can require National or State Banks or other persons who hold property for the benefit of another to hand over such property to the state or to any of its agencies without notice to the owner of such property and without judicial decree.

(9) In holding that, "the portions of the Act dealing with dormant bank deposits do not provide for a seizure of the deposits and vesting of title or ownership in the State but merely for a transfer of property."

(10) In holding that "the controversial portions of the Act are reasonable (as to the time provided as well as to the procedure), and that they would not constitute a deprivation of property without due process of law in violation of the Constitution of the United States even in the [foi. 174] absence of the provision requiring notice to be posted at the courthouse door."

(11) In holding that "there is no unwarranted interference with such (National) Banks, and no frustration of the purposes of national legislation concerning them such as to render the Act invalid as to them."

Charles W. Milner, Leo T. Wolford, Counsel for
Appellants and Petitioners Herein.

Bullitt and Middleton, Of Counsel.

Have Seen:

Earl S. Wilson, Attorney for Appellees.

7. ———

[foi. 175]

[File endorsement omitted]

IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

ORDER ALLOWING APPEAL—Filed June 18, 1943

This day came the Anderson National Bank, Suing on Behalf of Itself and All Others Similarly Situated, and filed herein its Petition for Appeal to the Supreme Court of the United States from the Court of Appeals of Ken-

tucky, its Assignment of Errors in connection therewith, Statement as to the Jurisdiction of the Supreme Court of the United States and it appearing from the Record of the above entitled cause that there was drawn in question the illegality and unconstitutionality of the Kentucky Escheat Act of 1940, being KRS 393.010 through 393.990 (formerly Carroll's Kentucky Statutes 1605-A through 1622-1, as amended by Chapter 156 of the Acts of the General Assembly of 1942) and that Anderson National Bank suing on Behalf of Itself and All Others Similarly Situated contended before the Court of Appeals of Kentucky (1) that said Escheat Act as amended, requiring delivery to [fol. 176] the State of deposits declared to be presumed abandoned, constitute in effect, an attempted escheat of such deposits, is invalid and contrary to the due process clause of the 14th Amendment of the Constitution of the United States because of the absence of a requirement in said Act as amended of notice and judicial determination and (2) that as applied to National Banks said act as amended violates the National Banking Act; and that by its decision this Court considered such matters urged by the Anderson National Bank, Suing On Behalf of Itself And All Others Similarly Situated and decided that said Escheat Act as amended was legal, valid and constitutional in all respects, and did not violate the due process clause of the 14th Amendment to the Federal Constitution and was not in contravention of or in conflict with the National Bank Act, and that the decision of this Court was in favor of the legality of said Statutes of the State of Kentucky as interpreted, construed and applied by this Court.

It is ordered that an appeal be, and hereby, is allowed to the Supreme Court of the United States from the Court of Appeals of Kentucky as prayed in such petition, and that the Clerk of the Court shall within thirty (30) days from this date prepare, certify and transmit to the Clerk of the Supreme Court of the United States under his hand and seal of this Court a Transcript of the Record and proceedings herein.

It is further ordered that the Appellant, Anderson National Bank, Suing On Behalf Of Itself and All Others Similarly Situated, shall execute bond with surety to be approved by the undersigned in the sum of \$3,000 conditioned according to law, which bond shall operate as a supersedeas.

[fol. 177] The said Appellant, now having presented a bond in sum of \$3,000 with the Aetna Casualty & Surety Company, as Surety, it is ordered that the same be, and hereby, it is approved.

Will H. Fulton, Chief Justice of the Court of Appeals of Kentucky.

June 18, 1943.

[fols. 178-185] Bond on appeal for \$3,000—00/190 approved June 18, 1943, omitted in printing.

[fol. 186] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

PRÆCIPE FOR RECORD

To the Clerk of the Court of Appeals of Kentucky:

You are hereby requested to make a Transcript of Record to be filed in the Supreme Court of the United States pursuant to an appeal allowed in the above entitled cause, and to include in such Transcript of Record copies of the following papers filed on the dates as follows, to-wit:

Plaintiffs' Bill of Complaint in Equity and Petition for a Declaratory Judgment, August 27, 1940, and the Exhibits and Appendix thereto.

Plaintiffs' Notice of Motion for Temporary Injunction, August 27, 1940.

Plaintiffs' Motion for Temporary Injunction, August 27, 1940.

[fol. 187] Order of Franklin Circuit Court granting Temporary Injunction, August 27, 1940.

Bond, August 27, 1940.

Defendants' Demurrer, September 26, 1940.

Order, Franklin Circuit Court, September 26, 1940.

Defendants' Motion to Strike, September 26, 1940.

Defendants' Answer, October 15, 1941.

Order, Franklin Circuit Court, January 30, 1942.

Plaintiffs' Demurrer, January 30, 1942.

Order, Franklin Circuit Court, January 30, 1942.

Order, Franklin Circuit Court, April 13, 1942.

Defendants' Motion, April 13, 1942.

Defendants' Motion, April 13, 1942.

Order, Franklin Circuit Court, April 16, 1942.
 Defendants' Amended Answer, April 16, 1942.
 Plaintiffs' Demurrer to Defendants' Amended Answer,
 April 23, 1942.
 Order, Franklin Circuit Court, April 23, 1942.
 Order, Franklin Circuit Court, May 8, 1942.
 Plaintiffs' Motion, July 3, 1942.
 Order, Franklin Circuit Court, July 3, 1942.
 Supersedeas Bond, July 3, 1942.
 Supersedeas, July 3, 1942.
 Order and Opinion of Court of Appeals, December 18,
 1942.
 Petition for Rehearing, February 15, 1943.
 Order, Court of Appeals, May 7, 1943.
 Order, Court of Appeals, June 5, 1943.
 Mandate, Court of Appeals, issued June 4, 1943, Filed
 in Franklin Circuit Court, June 4, 1943.
 Judgment, Franklin Circuit Court, June 4, 1943.
 Appellant's Motion in Court of Appeals, June 9, 1943.
 [fol. 188] Order, Court of Appeals, June 15, 1943.
 Opinion, Court of Appeals, June 15, 1943.

The following papers in connection with the appeal to
 the Supreme Court of the United States:

Petition for Appeal.
 Assignment of Errors.
 Separate Statement as to Jurisdiction required by Para-
 graph I, Rule 12 of the Revised Rules of the Supreme Court
 of the United States.
 Order Allowing Appeal.
 Appeal Bond.
 Citation with Return or Admission of Service.
 Notice and Statement to Appellee Pursuant to Rule 12,
 Paragraph 2.
 This Praecipe.
 (Signed) Charles W. Milner, Leo T. Wolford, At-
 torneys for Anderson National Bank, Suing on
 Behalf of Itself and All Others Similarly Situ-
 ated.
 Bullitt and Middleton, Of Counsel.
 Have seen:
 This 18th day of June, 1943.
 (Signed) Earl S. Wilson, Attorney for Appellees.

[fol. 189] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 190] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1943

[Title omitted]

STATEMENT OF POINTS AND DESIGNATION OF RECORD—Filed July 22, 1943

Now comes the Appellant in the above entitled cause and for its statement of points to be relied upon adopts its Assignment of Errors and states that the entire record as certified is necessary for the use of the Court.

Charles W. Milner, Leo T. Wolford, Attorneys for Appellant.

Bullitt & Middleton, of Counsel.

Copy received this 16 day of July, 1943.

Earl S. Wilson, A. E. Funk, Attorneys for Appellees.

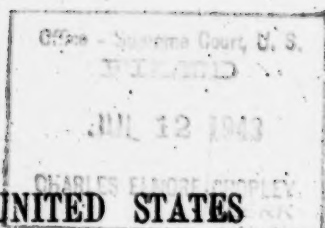
[fol. 191] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—October 11, 1943

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 47,647. Kentucky, Court of Appeals. Term No. 154. Anderson National Bank, Suing on behalf of itself and all others similarly situated. Appellants, vs. H. Clyde Reeves, Individually and as Commissioner of Revenue of the State of Kentucky, etc., et al. Filed July 12, 1943. Term No. 154 O. T. 1943.

FILE COPY



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 154

**ANDERSON NATIONAL BANK, SUING ON BEHALF OF
ITSELF AND ALL OTHERS SIMILARLY SITUATED,**
Appellants,

vs.

**H. CLYDE REEVES, INDIVIDUALLY AND AS COMMISSIONER
OF REVENUE OF THE STATE OF KENTUCKY, ETC., ET AL.**

**APPEAL FROM THE COURT OF APPEALS OF THE STATE OF
KENTUCKY.**

STATEMENT AS TO JURISDICTION.

✓ **CHARLES W. MILNER,**
✓ **LEO T. WOLFORD,**
Counsel for Appellant.

BULLITT & MIDDLETON,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 154

ANDERSON NATIONAL BANK, SUING ON BEHALF OF
ITSELF AND ALL OTHERS SIMILARLY SITUATED,

versus

Appellants,

H. CLYDES REEVES, INDIVIDUALLY AND AS COMMISSIONER
OF REVENUE OF THE STATE OF KENTUCKY AND A MEMBER
OF THE KENTUCKY TAX COMMISSION; C. M. C. PORTER
AND R. L. MCFARLAND, INDIVIDUALLY AND AS ASSOCIATE
COMMISSIONERS OF REVENUE OF THE STATE OF KENTUCKY
AND AS MEMBERS OF THE KENTUCKY TAX COMMISSION;
HUBERT MEREDITH, INDIVIDUALLY AND AS ATTORNEY
GENERAL OF THE STATE OF KENTUCKY;

Appellees.

**SEPARATE STATEMENT AS TO JURISDICTION RE-
QUIRED BY PARAGRAPH 1 OF RULE 12 OF THE
REVISED RULES OF THE SUPREME COURT OF
THE UNITED STATES.**

Anderson National Bank, Suing on Behalf Of Itself And
All Others Similarly Situated (hereinafter called the
Banks) in connection with its appeal to the Supreme Court
of the United States from the final judgment and decision

of the Court of Appeals of Kentucky in the above entitled cause rendered on June 15, 1943, submits this, its separate statement as to jurisdiction required by Paragraph 1 of Rule 12 of the Revised Rules of the Supreme Court of the United States.

This is a suit by Anderson National Bank, suing on behalf of itself and all other banks, both National and State, and all others who hold property which the Kentucky Escheat Act of 1940, as amended in 1942, declares presumed abandoned and which requires the banks and others to report such presumed abandoned property to the Department of Revenue of the State of Kentucky and, under heavy penalty, to voluntarily and without notice to the owners, suit or judicial decree turn over to the Department of Revenue all such presumed abandoned property.

The Court of Appeals of Kentucky in its first opinion and decision in this case dated December 18, 1942, 293 Ky. 735, 170 S. W. (2) 350, affirmed the judgment of the Franklin Circuit Court in so far as such court had held that the Kentucky Statutes did not violate the National Banking Act as to National Banks, and reversed the Circuit Court in so far as such court had permanently enjoined the defendants from enforcing those provisions of the Act which required the voluntary turning over to the State of property which the statutes declared presumed abandoned on the ground that those parts of the Act were violative of the due process clause of the 14th Amendment to the Constitution of the United States. The case was thereupon remanded to the Franklin Circuit Court, and such court on June 4, 1943, entered a Final Judgment in conformity with the opinion and decision of the Court of Appeals of Kentucky.

On appeal from such judgment, the Court of Appeals of Kentucky held in its decision of June 15, 1943 (not officially reported) against the contention of the banks that such

Kentucky Statutes as construed by it (a) requiring all national and State Banks to report and to voluntarily turn over to the Department of Revenue all demand and time deposits which have been inactive or dormant for eight and twenty-five years respectively, and (b) requiring that all persons holding personal property for the benefit of another which has been unclaimed for ten years to report and to voluntarily turn over to the Department of Revenue such personal property, are not in conflict with the National Banking Act as to National Banks, and do not violate the due process clause of the 14th Amendment of the Constitution of the United States as to all banks and all other persons required to report and surrender property to the Department of Revenue; and the decision and judgment of the Court of Appeals of Kentucky sustained the validity and constitutionality of the Kentucky Escheat Act of 1940 as amended in 1942 and such court rendered its decision in favor of the legality and validity of such statutes of the State of Kentucky as so construed by it:

(a) The Statutory Provisions Believed to Sustain the Jurisdiction.

The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment complained of is conferred by Section 237a of the Judicial Code as amended by the Act of February 13, 1925, 28 U. S. C. A., Section 344(a).

(b) The Statutes of the State, the Validity of Which Is Involved.

When this suit was filed in the Franklin Circuit Court, and when the May 8, 1942, Final Judgment of that court was entered, Carroll's Kentucky Statutes, Baldwin's 1936 Revision, and the supplements thereto, were the official edition of the Kentucky Statutes, therefore the pleadings

and the May 8, 1942, judgment of the Franklin Circuit Court referred to such statutes. While the case was on appeal to the Kentucky Court of Appeals for the first time, the Kentucky Revised Statutes became the official Statutes of Kentucky, therefore, the first opinion of the Court of Appeals of Kentucky, dated December 18, 1942, and all subsequent judgments, orders and opinions make references to the Kentucky Revised Statutes. The Kentucky Revised Statutes are a re-write and a re-grouping of the former Carroll's Statutes.

There is summarized below the Kentucky Revised Statutes, Page 2596 *et seq.*, the validity of which is involved. The numbers in parentheses are the comparable sections in the Carroll's Kentucky Statutes; February, 1941, Supplement Page 116, *et seq.*:

"393.010 (1605a; 1610) CONSTRUCTION OF CHAPTER, (1) As used in this chapter, unless the context requires otherwise:

• • • • •
 "(d) 'Person' means any individual, state or national bank, partnership, joint stock company, business, trust, association, corporation, or other form of business enterprise, including a receiver, trustee or liquidating agent. • • • • •"

"393.060 (1610) DEPOSITS IN BANK OR TRUST COMPANY PAYABLE ON DEMAND; WHEN PRESUMED ABANDONED.

"Any deposit (legal, beneficial, equitable or otherwise) payable on demand in any bank or trust company in this state, together with the interest thereon shall be presumed abandoned unless the owner has, within ten successive years next preceding the date as of which reports are required by KRS 393.110:

(1) Negotiated in writing with the bank or trust company concerning it;

(2) Been credited with interest on the pass book or certificate of deposit on his request;

(3) Had a transfer, disposition of interest or other transaction noted of record in the books or records of the bank or trust company; or

(4) Increased or decreased the amount of the deposit,

“393.070 (1610) DEPOSITS NOT PAYABLE ON DEMAND; WHEN PRESUMED ABANDONED.”

This section has the identical provision as to demand deposits as is contained in the preceding section except that the time is twenty-five instead of ten years.

“393.080 (1610) DEPOSITS FOR SECURITY; WHEN PRESUMED ABANDONED.”

“Any deposit of money, stocks, bonds or other credits made to secure payment for services rendered or to be rendered, or to guarantee the performance of services or duties, or to protect against damage or harm, and the increments thereof, shall be presumed abandoned unless claimed by the person entitled thereto within ten years after the occurrence of the event that would obligate the holder or depository to return it or its equivalent.”

“393.090 (1610) INTANGIBLE PERSONAL PROPERTY HELD FOR ANOTHER; BENEFITS ON ANY INSTRUMENT; WHEN PRESUMED ABANDONED.

“All dividends, stocks, bonds, money, credits and claims for money and credits, and all intangible personal property, and the increments of any of them, held in this state by any person for the benefit of another shall be presumed abandoned unless claimed by the beneficiary or person entitled thereto within ten years from the time the holder, trustee, debtor, or other

responsible person became obligated to return them or their equivalent to the proper owner or claimant."

.

"393.110 (1611) HOLDERS OF ABANDONED PROPERTY TO REPORT TO DEPARTMENT; POSTING OF NOTICES; DUTY TO SURRENDER PROPERTY TO DEPARTMENT; RIGHTS OF ACTION.

"(1) It shall be the duty of all state and National banks, trust companies, or other persons, and courts of this Commonwealth or the agents thereof, whether holding estates or property as bailee, depository, debtor, trustee, executor, liquidator, administrator, distributor, receiver, or in any other capacity coming within the purview of KRS 393.060 to 393.100, to report annually to the department as of July 1, all property held by them declared by this chapter to be presumed abandoned."

"(2) Any person who has made a report of any estate of property presumed abandoned, as required by this chapter, shall between November 1 and November 15 of each year, turn over to the department all property so reported; but if the person making the report or the owner of the property shall certify to the department by sworn statement that any or all of the statutory conditions necessary to create a presumption of abandonment no longer exist or never did exist, or shall certify the existence of any fact or circumstance which has a substantial tendency to rebut such presumption, then, the person reporting or holding the property shall not be required to turn the property over to the department except on order of court."

"(3) The person reporting or holding the property or any claimant thereof shall always have right to a judicial determination of his rights under this chapter and nothing therein shall be construed otherwise; and the Commonwealth may institute an action to recover such property as is presumed abandoned whether it has been reported or not"

.

"393.130 (1613) TRANSFEROR TO DEPARTMENT RELIEVED OF LIABILITY.

"Any person who transfers to the department property to which the state is entitled under this chapter shall be relieved of any liability to the owner arising from that transfer. The state shall reimburse any person who cannot be relieved of such liability by this section for all liability to the owner of the property or estate or damage incurred by reason of compliance with this chapter."

"393.140 (1614) CLAIM OF INTEREST IN PROPERTY SURRENDERED TO STATE.

"(2) Any person claiming an interest in any estate or property paid or surrendered to the state in accordance with KRS 393.060 to 393.120, that was not subsequently adjudged under the procedure set out in KRS 393.230 to have been actually abandoned, or owned by a decedent who had no heir, distributee, devisee or other person entitled under the laws of this state relating to wills, descent and distribution to take the legal or equitable title, may file his claim to it at any time after it was paid to this state."

"393.150 (1615) COMMISSIONER TO DETERMINE CLAIMS."

"393.160 (1615) APPEALS FROM DECISION OF COMMISSIONER."

"393.170 (1616) PROPERTY IN FEDERAL CUSTODY; DETERMINATION OF WHETHER ESCHEAT HAS OCCURRED."

“393.230 (1619) PROCEEDING TO FORCE PAYMENT OF INTANGIBLE PROPERTY; TO ESTABLISH ACTUAL ABANDONMENT.

“(1) If any person or the agent of any court refuses to pay or surrender intangible property to the department as provided in KRS 393.060 to 393.110, an equitable proceeding may be brought on the relation of the commissioner to force payment or surrender. All property subject to KRS 393.060 to 393.110 may be listed and included in a single action.

“(2) If any intangible property is turned over to the department on presumption of abandonment, in accordance with KRS 393.060 to 393.120, the commissioner may at any subsequent time institute proceedings to establish conclusively that it was actually abandoned, or that the owner has died and there is no person entitled to it.”

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“393.290 (1622-1) CIVIL ACTION TO ENFORCE PRODUCTION OF REPORTS, SURRENDER OF PROPERTY.

“(1) The department may require the production or reports, or the surrender of property as provided in this chapter by civil action, including an action in the nature of a bill of discovery, in which case the defendant shall pay a penalty equal to ten per cent of all amounts that he is ultimately required to surrender. This penalty shall not exceed five hundred dollars.

“(2) Any person who in good faith contests the applicability of this chapter to him may be relieved of the threat of any penalty by posting a compliance bond in an amount and of surety sufficient to the court.”

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“393.990 (1622-1) PENALTIES

“Any person who refuses to make any report as required by this chapter shall be fined not less than fifty

dollars nor more than two hundred dollars, or imprisoned for not less than thirty days nor more than six months, or both."

There is appended hereto a full copy of the Kentucky Escheat Act of 1940 and the 1942 Amendment as they appeared in the Carroll's Statutes. There is also appended the entire Escheat Act as amended and now contained in the Kentucky Revised Statutes.

(c) The Date of the Judgment or Decree Sought to Be Reviewed and the Date of the Application for Appeal.

The Court of Appeals of Kentucky which is the highest court of Kentucky rendered the decision and judgment sought to be reviewed on June 15, 1943 and on June 18, 1943, the banks applied for, and were allowed this appeal.

The June 15, 1943, opinion of the Court of Appeals of Kentucky, a copy of which is appended hereto was in favor of the validity of the Kentucky Escheat Act of 1940 as amended in 1942, as construed by it and against the contention of the banks that such statutes as applied to National banks were in conflict with, and were repugnant to the National Bank Act, and as to all banks and other persons required to report and voluntarily surrender presumed abandoned property were repugnant to and in violation of the due process clause of the 14th Amendment of the Constitution of the United States.

The Federal Question Raised.

The Banks in the original Bill of Complaint in Equity filed in the Franklin Circuit Court pleaded among other things as follows:

"As to plaintiff and other National Banks for whom it sues, the Kentucky Escheat Act of 1940 (Ky. St. 1605a through 1622-1, both inclusive), is in violation of the National Banking Laws."

"The Act deprives the banks, and their depositors of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. * * *"

"The said Act is an attempt by the State of Kentucky to take the property of plaintiff and all others for whom it is suing for public use without due process of law and without just or any compensation therefor and in violation of the rights accruing to plaintiff and those for whom it sues by the Constitution of the State of Kentucky and by the Constitution of the United States, which rights are specifically set up and claimed by the plaintiff and those for whom it sues."

The Circuit Court held (a) that the Escheat Act did not violate the National Banking Act, and (b) that it was violative of the Fourteenth Amendment to the Federal Constitution in so far as it attempted to require the banks and others holding "presumed abandoned property" to voluntarily turn over to the State such "presumed abandoned property" without notice to the owner, hearing or judicial decree. The judgment of the Circuit Court denied the banks the injunction which they sought in so far as national banks were concerned and contained a permanent injunction preventing the defendants and all others from attempting to enforce this unconstitutional part of the Act.⁶

The banks appeal to the Court of Appeals of Kentucky from so much of the judgment of the Circuit Court as held that the Act did not violate the National Banking Act and the defendants filed a Cross-Appeal in the Court of Appeals from so much of the Circuit Court judgment as granted the permanent injunction on the ground that the Act was violative of the Fourteenth Amendment to the Federal Constitution.

The Court of Appeals by an opinion and order dated December 23, 1942, affirmed the Circuit Court judgment which held that the Act was not violative of the National

Banking Act and reversed the Circuit Court in so far as that court had held any part of the Act violative of the Federal Constitution and directed the Circuit Court to enter an order in conformity with the opinion and decision of the Court of Appeals of Kentucky.

In the December 23, 1942 Opinion of the Court of Appeals 293 Ky. 735, 170 S. W. (2) 350, it said:

"Appellants advance the propositions (1) that the provisions of the Act requiring delivery to the State of deposits declared to be presumed abandoned constitute, in effect, an attempted escheat of such deposits, which is invalid because of the absence of notice and judicial determination, . . . and (3) that in any event such provisions even though valid as to state banks, are invalid as to national banks. These propositions will be considered in the order named." . . .

"But the portions of the Act dealing with dormant bank deposits do not provide for a seizure of the deposits and vesting of title or ownership in the state but merely for a transfer of property . . ."

. . .

"It is our conclusion that the controversial portions of the Act are reasonable (as to the time provided as well as to the procedure) and that they would not constitute a deprivation of property without due process of law in violation of the Constitution of the United States even in the absence of the provision requiring notice to be posted at the courthouse door. Accordingly, it becomes unnecessary to discuss the sufficiency of such notice."

. . .

"The question of validity of the Act as applied to national banks must be approached in the light of the limitations applicable to state legislation affecting such institutions. National banks are amenable to state laws as are other institutions if such laws do not

interfere with their functions in such manner as to conflict with the general objects and purposes of the National Banking Act." * * *

* * * it is our opinion that the Act has no tendency to cause depositors to hesitate on account of apprehended fear of confiscation to make deposits in national banks. This being true, there is no unwarranted interference with such banks and no frustration of the purposes of national legislation concerning them such as to render the Act invalid as to them."

On the return of the case to the Franklin Circuit Court that court in conformity with the opinion and decision of the Court of Appeals of Kentucky entered an order holding in part as follows:

"That the Kentucky Escheat Act of 1940, being KRS 393.010 through 393.990 (formerly Carroll's Kentucky Statutes 1605-a through 1622-1, as amended by Chapter 156 of the Acts of the General Assembly of 1942), as applied to the plaintiff, Anderson National Bank, suing on behalf of itself and all others similarly situated, is valid and is not in conflict with the National Banking Act, or with the Due Process Clause of the State Constitution, or of the Fourteenth Amendment of the Constitution of the United States.

That the plaintiffs' petition herein be, and it is, dismissed."

The Circuit Court thereby denied to the banks the injunctive relief which they had asked for.

The banks thereupon appealed such final judgment of the Franklin Circuit Court to the Court of Appeals of Kentucky and that court affirmed, by an order and opinion dated on June 15, 1943, the judgment of the Franklin Circuit Court.

In its second opinion delivered June 15, 1943 (not yet officially reported) the Court of Appeals of Kentucky said:

"This is the second appeal of this case. The opinion on the first appeal reported in 293 Ky. 735, 170 S. W. (2) 350, upheld the validity of the principal sections of Chapter 79 of the Acts of 1940 as amended by Chapter 156 of the Acts of 1942, KRS 393.010, and affirmed the judgment of the lower court on the appeal but reversed it on the cross-appeal. On the return of the case to the lower court judgment was entered in conformity with the opinion. This appeal is from that judgment. We are bound by the Opinion on the first appeal whether it be right or wrong under our familiar law of the case rule. We have considered the contentions (1) that the act in question conflicts with the National Banking Act (2) that it is violative of the due process clause of the Fourteenth Amendment to the Federal Constitution and find the contentions without merit. Since the judgment is in conformity with the former opinion it is affirmed."

The questions involved are substantial. In *First National Bank of San Jose v. California*, 262 U. S. 366, there was involved a California Statute which attempted to escheat deposits that had been inactive or dormant for twenty years. The California Statute provided for abundant notice, suit and a judicial decree before the deposits could be taken. The Supreme Court held that such Statutes as applied to National Banks were violative of the National Banking Act in an opinion which is in part as follows:

"Section 5136, U. S. Revised Statutes, confers upon national banks power to receive deposits, which necessarily implies the right to accept loans of money, promising to repay upon demand the lender or his order. These banks are instrumentalities of the Federal Government. . . ."

“Does the statute conflict with the letter or general object and purposes of the legislation by Congress? Obviously, it attempts to qualify in an unusual way agreements between national banks and their customers long understood to arise when the former receive deposits under their plainly granted powers. If California may thus interfere other States may do likewise; and, instead of twenty years, varying limitations may be prescribed—three years perhaps, or five, or ten, or fifteen. We cannot conclude that Congress intended to permit such results. They seem incompatible with the purpose to establish a system of governmental agencies specifically empowered and expected freely to accept deposits from customers irrespective of domicile with the commonly consequent duties and liabilities. . . .”

“This Court has often pointed out the necessity for protecting federal agencies against interference by state legislation. . . .”

Since the above decision by the Supreme Court, each case on the subject has followed it with the exception of the present decision and opinion of the Court of Appeals of Kentucky.

As to State banks and others, the Kentucky statutes involves are the only ones of which we are aware that provide for a taking of inactive or dormant deposits from banks and for the taking of other unused property without notice to the owner, suit and judicial decree. If the decision of the Court of Appeals of Kentucky is permitted to stand, then other States may, as suggested by this Court, take from National Banks deposits that have been inactive for only three years and the States will have found a way to regulate National Bank deposits. Also, if the decision of the Court of Appeals of Kentucky is permitted to stand, then a way has been found by which States can raise revenue by just taking dormant deposits and other vacant

and unused property without notice to the owner, hearing or judicial decree.

The banks file herewith:

(1) A copy of the Opinion of the Court of Appeals of Kentucky dated June 15, 1943, marked Exhibit "A".

(2) A copy of the Opinion of the Court of Appeals of Kentucky dated December 23, 1942, marked Exhibit "B".

(3) A copy of Kentucky Escheat Act of 1940, marked Exhibit "C".

(4) A copy of the 1942 Amendment, marked Exhibit "D", and

(5) A copy of said Statutes as now contained in the Kentucky Revised Statutes, marked Exhibit "E".

The banks file herewith an Assignment of Errors as to such final decision of the Court of Appeals of Kentucky.

CHARLES W. MILNER,
LEO T. WOLFORD,
*Counsel for Appellants and
Petitioners herein.*

BULLITT & MIDDLETON,
Of Counsel.

EXHIBIT "A".**COURT OF APPEALS OF KENTUCKY**

June 15, 1943

ANDERSON NATIONAL BANK, ETC., *Appellant*,***vs.*****H. CLYDE REEVES, INDIVIDUALLY, ETC., *Appellee*.**

Appeal from Franklin Circuit Court

Hon. W. B. Ardery, Judge

Opinion by Chief Justice Fulton—Affirming.

This is the second appeal of this case. The opinion on the first appeal, reported in 293 Ky. 735, 170 S.W. (2d) 350, upheld the validity of the principal sections of Chapter 79 of the Acts of 1940 as amended by Chapter 156 of the Acts of 1942 (KRS 393.010 et seq.) and affirmed the judgment of the lower court on the appeal but reversed it on the cross-appeal.

On the return of the case to the lower court judgment was entered in conformity with this opinion. This appeal is from that judgment.

We are bound by the opinion on the first appeal, whether it be right or wrong, under our familiar law of the case rule. We have considered the contentions 1) that the Act in question conflicts with the National Banking Act and 2) that it is violative of the due process clause of the 14th Amendment to the Federal Constitution and find the contentions without merit.

Since the judgment is in conformity with the former opinion it is affirmed.

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A. E. FUNK, *Asst. Atty. Gen.*, Frankfort, Kentucky.

EXHIBIT "B".

COURT OF APPEALS OF KENTUCKY

December 18, 1942

ANDERSON NATIONAL BANK, ET AL., *Appellant*,

vs.

H. CLYDE REEVES, individually and as Commissioner of Revenue, *Appellee*.

Appeal from Franklin Circuit Court
Hon. Wm. B. Ardery, Judge

Opinion by Judge Fulton—Affirming on the Original Appeal and Reversing on the Cross-Appeal.

This appeal brings in question the correctness of a judgment holding valid certain parts of Chap. 79 of the Acts of 1940 (K.R.S. 393.010 et seq.) as amended by Chap. 156 of the Acts of 1942, dealing with escheats and with the disposition of certain classes of property declared to be presumed abandoned. By the cross appeal it is sought to reverse the judgment in so far as it adjudged certain portions of the same Acts invalid.

By sections 3 to 6 of the Act inclusive (K.R.S. sections 393.020, 393.030, 393.040 and 393.050) certain classes of property are made subject to escheat and it is made the duty of the Commissioner of Revenue to institute proceedings to vest title to such property in the Commonwealth, the procedure to be in accordance with the Civil Code. Where title to such property is vested in the Commonwealth pursuant to such proceedings, any person claiming an interest therein, and who was not actually served with notice and did not appear in the proceedings, may within five years

after the judgment file his claim with the Department of Revenue. Appropriate procedure is provided for the prosecution of such claims and right of appeal is given to the Franklin Circuit Court and to this court. These portions of the Act are not in controversy although it is suggested by appellants that the entire Act should be declared invalid. They are mentioned, however, for the purpose of giving a general idea as to the scope of the Act.

So far as material to this controversy section 7 of the Act (K.R.S. 393.060 and 393.070 provides in substance:

(1) That where the owner of bank deposits payable on demand has not for ten successive years next preceding the date for making reports as required by the Act (a) negotiated in writing with the bank or trust company concerning it, or (b) been credited with interest on the pass book or certificate of deposit on his request, or (c) had a transfer, distribution of interest, or other transaction noted of record in the books or records of the bank or trust company, or (d) increased or decreased the amount of deposit, such deposits shall be presumed abandoned.

(2) The same presumption of abandonment arises with respect to deposits not payable on demand except that the period of time is twenty-five years instead of ten.

Section 8 (K.R.S. 393.110) provides in substance that all persons holding property declared to be presumed abandoned must report same to the Department of Revenue annually as of July 1, the report being due on or before September 1 of each year. A copy of the report is required to be posted on the courthouse door or bulletin board on or before October 1 and it is provided that such publication "shall be constructive notice to all interested parties and shall be in addition to any other notice provided by statute or existing as a matter of law". The person reporting the property is required to turn it over to the Department of Revenue between November 1 and November 15 except that "if the person making the report or the owner of the property shall certify to the Department by sworn statement that any or all of the statutory conditions necessary to create a presumption of abandon-

ment no longer exists or never did exist or shall certify the existence of any fact or circumstance which has a substantial tendency to rebut such presumption, then the person reporting or holding the property shall not be required to turn the property over to the Department except in order of court The person reporting or holding the property or any claimant thereof shall always have the right to judicial determination of his rights under this Act and nothing therein shall be construed otherwise; and the Commonwealth may institute an action to recover such property as is presumed abandoned whether it has been reported or not"

Section 17 (K.R.S. 393.250) provides that all monies received by the Department of Revenue under the provisions of the Act must be deposited with the State Treasurer and credited to the account of the General Expenditure Fund.

Section 11 (K.R.S. 393.140) provides that any person claiming an interest in any property turned over to the state on the ground that it was presumed abandoned (provided it was not subsequently adjudged to have been actually abandoned) may claim it "at any time after same was paid to this Commonwealth"; and, even where actual abandonment was adjudged subsequent to payment to the state, any person claiming an interest, who was not actually served with notice and who did not appear, and whose claim was not considered during the proceedings, may within five years after the judgment file his claim with the Department.

Section 12 (K.R.S. 303.140) provides that if a claimant establishes his right to property presumed abandoned the Commissioner of Revenue must authorize payment to him of a sum "equal to the same amount which was paid in to the State Treasury in compliance with this Act".

The claimant is required to publish notice of his claim, within fifteen days after filing it, in a newspaper in the county in which the property was held before being transferred to the Commonwealth.

Section 10 (K.R.S. 393.130) provides: "Any person who transfers to the department property to which the state is

entitled under this chapter shall be relieved of any liability to the owner arising from that transfer. The state shall reimburse any person who cannot be relieved of such liability by this section for all liability to the owner of the property or estate or damage incurred by reason of compliance with this chapter."

Section 16 (K.R.S. 393.230) provides that if any one refuses to pay or surrender property presumed abandoned to the Department as required by the Act, an equitable proceeding may be brought on relation of the Commissioner to force payment or surrender. It is further provided that if property is turned over to the Department on presumption of abandonment the Commissioner may at any subsequent time institute proceedings to establish conclusively that it was *actually* abandoned, or that the owner has died and there is no person entitled to it. It is also provided in this section that all actions mentioned under the Act shall be filed as equity actions and follow the procedure provided by the Civil Code of Practice, unless otherwise provided.

This action was filed under the Declaratory Judgment Act by the Anderson National Bank, suing on behalf of itself and all others similarly situated and on behalf of depositors in banks, to test the validity of the Act and an injunction was sought to prevent the appellees from enforcing it—the appellees do not question the right of appellants to challenge the validity of the Act in the representative status assumed.

The trial court adjudged that the part of the Act requiring a voluntary delivery of the property to the state was unconstitutional because of the absence of provision for adequate notice to the owners of the property. Accordingly, the appellees were enjoined from insisting on or accepting a delivery of property presumed abandoned without first filing a suit and procuring a judgment for delivery thereof. It was adjudged that the Act was valid in so far as it required reports of property presumed abandoned and in so far as it authorized the filing of actions to compel the surrender of property declared to be presumed abandoned. Accordingly, the trial court declined to enjoin appellees from requiring reports of property presumed

abandoned and also declined to enjoin appellees from filing suits to recover property presumed abandoned, whether reported or not.

Appellants question the correctness of the judgment in holding the indicated portions of the Act valid and the appellees, by cross appeal, seek a reversal of the judgment in so far as it holds any part of the Act unconstitutional or enjoins enforcement thereof.

Appellants advance the propositions 1) that the provisions of the Act requiring delivery to the State of deposits declared to be presumed abandoned constitute, in effect, an attempted escheat of such deposits, which is invalid because of the absence of notice and judicial determination, 2) that even if valid as to deposits made subsequent to the Act such provisions are ineffective as to prior deposits because, when so applied, such provisions impair the obligation of the contract of deposit, and 3) that in any event such provisions, even though valid as to state banks, are invalid as to national banks. These propositions will be considered in the order named.

Appellants' brief contains an elaborate and scholarly treatise on the origin, history and purposes of prior escheat laws of this state as a basis for their argument that the Act is unconstitutional in so far as it requires a delivery to the state of deposits declared to be presumed abandoned without a judicial determination to that effect made after adequate notice. And, were we dealing with an out and out escheat act, their argument would be most persuasive—we would unhesitatingly say that there can be no escheat except pursuant to judicial determination made after legal notice.

But such is not the case, notwithstanding appellants' vehement insistence to the contrary and notwithstanding the fact that the title of the Act recites that it relates to property actually or presumptively subject to escheat. Certain parts of the Act, as indicated above, do relate to out and out escheat but before title can become vested in the state judicial determination is necessary and such determination must be made after adequate notice since the proceedings are required to be according to the Civil Code.

But the portions of the Act dealing with dormant bank deposits do not provide for a seizure of the deposits and vesting of title or ownership in the state but merely for a transfer of property which may later be adjudged to be subject to escheat, and these provisions are for the benefit and protection of both the depositors and the state. As said by the Supreme Court in *Provident Institution for Savings v. Malone*, 221 U. S. 660, 31 S. Ct. 661, 55 L. Ed. 899, 31 L. R. S. (N. S.) 1129, in discussing a somewhat similar statute, "the statute proceeds on the general principle that corporations may become involved, or may be dissolved; or that, after long lapses of time, changes may occur which would require someone to look after the rights of the depositor. The statute deals with accounts of an absent owner, who has so long failed to exercise any act or ownership as to raise the presumption that he has abandoned his property. And if abandoned, it should be preserved until he or his representative appear to claim it; or, failing that, until it should be escheated to the state. The right and power so to legislate is undoubted."

The good faith of the Legislature cannot be questioned and it is to be assumed that the Act was for the protection of the deposits as well as for the benefit of the state. That this is a justifiable assumption is clearly revealed in the provision giving the depositor (and this, of course, includes his legal representatives) the right, without limit of time, to make a claim and receive a return of the deposit provided there has not been a judicial determination of actual abandonment—and even after such judicial determination five years is given for the same purpose to any person who was not actually served with notice and did not appear in the proceedings.

In this respect both the rights of the depositor and the bank are fully protected by giving to the depositor a right of action against the state, which is conclusively presumed always to be able to pay, and by the provision relieving the bank of liability to the depositor upon compliance with the Act, fortified by the further provision for reimbursement to the bank by the state for any liability incurred by reason of compliance with the Act. The mere taking away of the depositor's right of action against the bank constitutes no

substantial deprivation of property when, in lieu thereof, he is afforded an action against the Commonwealth, the most perfect of all protection.

Nor does the requirement that the owner making claim must publish notice of his claim in a newspaper within fifteen days after filing it impose such a burden as to constitute a substantial deprivation. This is a reasonable requirement and is for the benefit of depositors whose deposits have been turned over to the state. Publicity is thus given to such claims in order that the true owners may be put on notice if a false claim is made.

It is our conclusion that the controversial portions of the Act are reasonable (as to the time provided as well as to the procedure) and that they would not constitute a deprivation of property without due process of law in violation of the Constitution of the United States even in the absence of the provision requiring notice to be posted at the courthouse door. Accordingly, it becomes unnecessary to discuss the sufficiency of such notice.

The conclusion we have reached is fully supported by *Comth. of Pennsylvania v. Dollar Savings Bank*, 259 Pa. 138, 102 Atl. 569, 1 A. L. R. 1048; *State v. Security Sav. Bank*, — Calif. App. —, 154 Pa. 1070; *Provident Institution for Savings v. Malone*, supra, and *Brookline Borough Gas Co. v. Bennett*, 227 N. Y. S. 203. The latter case upheld a similar act dealing with consumer deposits with utility companies (a class of property within the purview of the presumptive abandonment provision of the act in question), but the legal questions involved were identical with ones confronting us here.

It is the contention of appellants that even though the Act be held valid it can apply only to deposits made after its effective date since its application to deposits made prior thereto would result in impairment of the contract between the depositor and the bank in violation of section 19 of the Constitution of Kentucky which prohibits the enactment of any law impairing the obligation of contracts. It is not argued that such application of the Act would result in violation of the contract clause of the Federal Constitution since this question was laid to rest by the Supreme Court

in *Provident Institution for Savings v. Malone*, supra and *Security Sav. Bank v. Calif.*, 263 U. S. 282, 68 L. Ed. 306, wherein it was held that such statutes are not violative of the contract clause. These decisions are binding on us as to the federal question but not on the question of application of the Constitution of this state. *Glenn et al v. Field Packing Co.*, 290 U. S. 177.

In support of their contention appellants rely on *Bank of Louisville v. Board of Trustees of Public Schools*, 83 Ky. 219, 5 S. W. 735 and *Louisville School Board v. Bank of Kentucky*, 86 Ky. 150, 5 S. W. 739. In each of these cases the statutes in question attempted to vest in the school board title to bank deposits of persons who were absent from the state for eight years and who had not exercised any control over the deposits during that time. It was provided that the school board should be liable to the owner of the deposit, if he should later claim it, *but that no such liability should attach to the state*. In each case it was held that the deposit created a contract between the depositor and the bank by which the latter acquired the right to retain, use and control the money until it was returned to the depositor on his demand and that the statutes were void because they impaired the obligation of the contract from the standpoint of both the bank and the depositor.

A careful analysis of those opinions, reveals, however, that the underlying basis of the court's conclusion was the absence of perfect protection to the depositor and the bank. The opinion in the former case, on which the latter is based, is threaded through with comments on the failure of the statute to give the depositor, in lieu of his right of action against the bank, the substantial remedy of looking to the state for reimbursement and on its failure to give the bank any substantial remedy since it was left with no remedy except that of looking to the school board for reimbursement in the event it was compelled to account for the deposits. It is doubtful, to say the least, that the court would have reached the conclusion it did had the statute afforded to both a depositor and the bank the same perfect protection as that afforded by the Act here involved.

In any event, we think the correct conclusion was reached by the Supreme Court in the two cases referred to. It

seems so clear as to require little discussion that there is no substantial impairment of the contract from the depositor's standpoint since his deposit is returnable to him by the state at any time he files a claim therefor. The argument as to impairment of the contract from the bank's standpoint was effectively answered by the Supreme Court in *Security Saving Bank v. Calif.*, *supra*, in these words: "The contract of deposit does not give the banks a tontine right to retain the money in the event that it is not called for by the depositor. It gives the bank merely the right to use the depositor's money until called for by him or some other person duly authorized. If the deposit is turned over to the state, in obedience to a valid law, the obligation of the bank to the depositor is discharged."

It is our conclusion that the parts of the Act requiring a delivery of deposits declared to be presumed abandoned to the Department of Revenue are valid in their application to deposits made both prior and subsequent to the effective date of the Act.

There is little appeal in the insistence of appellants that if the strict letter of the decisions in *Bank of Louisville v. Board of Trustees of Public Schools and Louisville School Board v. Bank of Kentucky*, *supra*, is not followed our decision should be made prospective in accord with the policy adopted in *Payne v. City of Covington*, 276 Ky. 380, 123 S. W. (2d) 1045, of affording protection to those who have acted in reliance on opinions of this court and whose rights might be adversely affected by a change of decision, since, as indicated above, no substantial impairment of any right of either depositors or banks is effected by the Act.

The question of validity of the Act as applied to national banks must be approached in the light of the limitations applicable to state legislation affecting such institutions. National banks are amenable to state laws as are other institutions if such laws do not interfere with their functions in such manner as to conflict with the general objects and purposes of the National Banking Act. *First National Bank of Elizabethtown v. Com.*, 187 Ky. 151, 219 S. W. 175; *McClellan v. Chipman*, 164 U. S. 347, 41 L. Ed. 461; *First National Bank of San Jose v. Calif.*, 262 U. S. 366, 67 L. Ed. 1030. The burden placed on national banks of making the report of such deposits as the Act declares to be presumed

abandoned is not an unwarranted interference. *Waite v. Dowley*, 94 U. S. 527, 24 L. Ed. 181. But, as said in *First National Bank of San Jose v. Calif.*, *supra*, "any attempt by a state to define their duties or control the conduct of their affairs is void whenever it conflicts with the laws of the United States or frustrates the purposes of the national legislation or impairs the efficiency of the bank to discharge the duties for which it was created. *Davis, Elmira Sav. Bank*, 161 U. S. 275, 40 L. Ed. 700, 16 Sup. Ct. Rep. 502".

Appellants insist that the case just quoted from is conclusive as to the invalidity of the Act in its application to national banks. In that case was involved the validity of California statutes as so applied. The statutes declared that deposits in bank to the credit of depositors who for more than twenty years had not made a deposit or withdrawn any part of the deposit and where neither the depositor nor any claimant had filed any notice with the bank showing his present resident, should *escheat* to the state. The court, in commenting on the opinion of the Supreme Court of California affirming a judgment directing the payment of such deposits to the state, pointed out that the California court had declined to express an opinion as to whether the judgment operated as a present escheat of the rights of the depositor or whether the depositor still had the right to prosecute an action to obtain payment of the deposit from the state. Therefore, in discussing the case, the Supreme Court treated the California statutes as statutes of escheat or confiscation and held them void as being a regulation of national banks to such an extent as to tend to frustrate the purposes and objects of national legislation with respect to such banks. This was the reason the California statutes were held to be invalid as to national banks and not, as suggested by appellees, the fact that the statutes impaired the obligation of the contract of deposit. Analysis of the opinion reveals, however, that the only undue interference of the statutes with national banks was embodied in one sentence of the opinion as follows: "The success of almost all commercial banks depends upon their ability to obtain loans from depositors, and these might well hesitate to subject their funds to possible confiscation."

Thus it seems that the California statutes were held invalid as to national banks because they were deemed by the court to be *escheat* statutes confiscating the deposits solely by reason of *dormancy*. The comment of the court on the failure of the California court to express an opinion on the right of the depositor to secure a return of the deposit is significant. Thus, while this case unquestionably decided that the California statutes were invalid as to national banks, and while this decision was reaffirmed as to the particular California statutes in the later case of *Security Sav. Bank v. California*, *supra*, we do not feel that it is controlling as to the act in controversy since the Act differs from the California statutes in that no escheat is declared by reason of mere dormancy—The Act is one pursuant to which mere custody, as distinguished from title, is vested in the state by reason of dormancy and is not one of confiscation having the tendency to cause depositors to hesitate to make deposits in national banks. And, since the confiscatory feature, which the Supreme Court had in mind as being the feature of the California statutes which tended to bring about an undue interference with national banks, is absent from the present Act, it does not appear to us that the case is controlling of the question now presented.

It is true that the Supreme Court of Tennessee in *American National Bank of Nashville v. Clarke*, Supt. of Banks, 175 Tenn. 480, 135 S.W. (2d) 935 and the United States Circuit Court of Appeals for the Sixth Circuit in *Star, Atty. Gen. v. O'Conner, Comptroller, et al*, 118 F. (2d) 548, relying on the authority of the case under discussion, held somewhat similar statutes of Tennessee and Michigan invalid as to national banks but it seems to us that those cases fail to give full consideration to the fact that the Supreme Court pointed out that the undue interference of the California statutes with national banks was brought about by the confiscatory nature of the statutes in providing out and out escheat by reason of mere dormancy. It is significant, though, that the opinion in the Sixth Circuit case did touch lightly on this aspect of the *San Jose Bank* case as is revealed by the remark that "the Michigan statutes resemble

the California Act in being closer akin to illegitimate laws of forfeiture than to legitimate laws of escheat.

Since the act in controversy does not provide for an escheat of deposits by reason of mere dormancy, as did the California statutes, (title being vested in the state only after judicial determination of *actual* abandonment), and since the depositor may at any time before actual abandonment is adjudged (and five years thereafter if he was not served with actual notice) secure a return of his deposit from the state, it is our opinion that the Act has no tendency to cause depositors to hesitate on account of apprehended fear of confiscation to make deposits in national banks. This being true, there is no unwarranted interference with such banks and no frustration of the purposes of national legislation concerning them such as to render the Act invalid as to them.

The judgment is affirmed on the original appeal and reversed on the cross appeal with directions to enter a judgment in conformity with this opinion. An order having been entered in this court suspending the operation of the Act during the pendency of the appeal, the circuit court will, on return of the case to that court, fix a date for compliance with the Act, giving a reasonable time for that purpose.

Whole court sitting except Judge Rees.

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EXHIBIT "C".

**Acts of the General Assembly, 1940, Chap. 79 (H. B. 321),
P. 333.**

"An Act relating to all classes of property actually or presumptively subject to escheat; providing the terms

upon which presumption of abandonment of property and presumption of the death of persons shall be determined; providing how and when said property may be escheated to the Commonwealth of Kentucky, providing for the reduction of all such property to cash, transferring the possession of same to the Treasurer of Kentucky; providing how any person who is legally entitled thereto may recover same from the Treasurer; providing that any person transferring property to the Commonwealth as required by this Act shall be relieved of liability to the owner thereof or reimbursed for any liability or damage incurred by complying with this Act; defining certain words; providing for reports and examination of records; providing for the administration and enforcement of this Act, and for an Assistant Attorney General as incident thereto; providing fines, penalties, and imprisonment for failure to comply with this Act; providing that if any provision of this Act shall be held unconstitutional that it is the Legislative intent that all other provisions thereof shall remain in force and effect; repealing sections 1610 to 1623, inclusive of Carroll's Kentucky Statutes, Baldwin's 1936 Revision; repealing all Acts and parts of Acts in conflict with this Act; repealing Chapter 168, Acts of the Regular Session of the 1938 General Assembly of the Commonwealth of Kentucky; and repealing, amending and re-enacting sections 1606, 1607, 1608, and 1609 of Carroll's Kentucky Statutes, Baldwin's 1936 Revision.

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"Sec. 1. That sections 1610 to 1623 inclusive of Carroll's Kentucky Statutes, 1936 edition, and Chapter 168, Acts of the Regular Session of the 1938 General Assembly be, and the same are hereby repealed.

"Sec. 2. (Ky. St. 1605a) Whenever used in this Act, unless the context requires otherwise, the word 'person' shall mean and include any individual, state and national bank, partnership, joint stock company, business, trust, association, corporation, or other form of business enterprise, including a receiver, trustee, or liquidating agent.

"Whenever used in this Act, unless the context requires otherwise, the word 'claim' shall mean to demand payment

or surrender of property from the person whose duty it is to pay the claimant, or surrender to him the property involved.

"Sec. 3. That section 1606 of Carroll's Kentucky Statutes, 1936 edition, be repealed, amended, and re-enacted so that when amended and re-enacted it shall read as follows:

(1606) "That part of estates or property having a situs in this Commonwealth, not disposed of by will of persons who have died, or may hereafter die without heirs or distributees entitled to the same; or which have been or may hereafter be devised to any person, or any heir or distributee or devisee of such person or of the testator, who has not claimed the same or shall not claim the same within eight (8) years after such death, shall vest in the Commonwealth, subject to all legal and equitable demands on same. All such property shall be liquidated and the proceeds thereof, less costs, fees, and expenses incidental to all legal proceedings of such liquidation shall be paid to the Department of Revenue. Any estates or property except a perfect title to a corporeal hereditament, which estates or property have been abandoned by the owner thereof, shall also vest in the Commonwealth, subject to all legal and equitable demands on same. All such property shall be liquidated and the proceeds thereof, less costs, fees, and expenses incidental to all legal proceedings of such liquidation shall be paid to the Department of Revenue.

"Sec. 4. That section 1607 of Carroll's Kentucky Statutes, 1936 edition, be repealed, amended, and re-enacted so that when amended and re-enacted it shall read as follows:

(1607) "The personal representatives of persons, whose estates or a part of whose estates are not distributed by will, and who died without heirs or distributees entitled to same, shall settle their accounts within one (1) year after qualifying as such and pay over to the Department of Revenue the proceeds of all personal estate, first deducting the proper legal liabilities of the estate.

"(1) If the whole personal estate cannot be settled and the accounts closed within one (1) year, the settlement as far as practicable, shall then be made and the proceeds paid over to the Department of Revenue, and the residue shall

be so settled and paid over as soon thereafter as can be properly done.

“(2) The personal representative shall take possession of the real estate of such decedent not disposed of by his will, and rent out the same from year to year until it is otherwise legally disposed of, and pay the net proceeds to the Department of Revenue.

“(3) The personal representative shall also make out and transmit to the Department of Revenue a description of the quantity, quality, and estimated value of such real estate and its probable annual profits.

“Sec. 5. That section 1608 of Carroll's Kentucky Statutes, 1936 edition, be repealed, amended, and re-enacted, so that when amended and re-enacted it shall read as follows:

(1608) “If any devisee or his heirs, advisee or distributee, or any heir or distributee of a testator has failed or shall hereafter fail for eight (8) years to claim his legacy the personal representative of such testator or other person having the same in possession shall, after deducting the legal liabilities thereon, pay and deliver over such legacy, whether the same be real or personal estate, and the net profits thereof to the Department of Revenue.

“Sec. 6. That section 1609 of Carroll's Kentucky Statutes, 1936 edition, be repealed, amended, and re-enacted, so that when amended and re-enacted it shall be read as follows:

(1609) “When any person owning property or estates having a situs in this Commonwealth is not known to be living for seven (7) successive years, and neither said owner, his heirs, devisees, or distributees can be located or proved to have been living for seven (7) successive years, such person shall be presumed to have died without heirs, devisees, or distributees, and both his real and personal estate shall be liquidated and the proceeds, less costs incident to the liquidation and any legal proceedings, and less the liabilities which have been properly claimed and approved against same, shall be paid to the Department of Revenue.

(1610) “Sec. 7. When the owner or owners (whether such ownerships be legal, beneficial, equitable, or otherwise)

of deposits payable on demand in any bank or trust company (either state or national) within this Commonwealth, have not or shall not within ten (10) successive years next preceding the date as of which reports are required to be made by section 8 of this Act, (a) negotiated in writing with the bank or trust company in respect thereto, or (b) been credited with interest on the pass book or certificate of deposit on his or their request, or (c) had a transfer, disposition of interest, or other transaction noted of record in the books or records of such bank or trust company, or (d) increased or decreased the amount of the deposit, such deposit and the interest thereon shall be presumed abandoned.

"When the owner or owners (whether such ownerships be legal, beneficial, equitable, or otherwise) of deposits other than those payable on demand in any bank or trust company (either state or national), within this Commonwealth, have not or shall not within twenty-five (25) successive years next preceding the date as of which reports are required to be made by section 8 of this Act, (a) negotiated in writing with bank or trust company in respect thereto, or (b) been credited with interest on the passbook or certificate of deposit on his or their request, or (c) had a transfer, disposition of interest, or other transaction noted of record in the books or records of such bank or trust company, or (d) increased or decreased the amount of the deposit during said period, such deposits and the interest thereon shall be presumed abandoned.

"All deposits of money, stocks, bonds, or other credits of any kind whatsoever made to secure payment for services rendered or to be rendered, or to guarantee the performance of services or duties, or to protect against damage or harm and the increments thereof, shall be presumed abandoned unless claimed by the person entitled thereto within ten (10) years after the occurrence of such event, as would obligate the holder or depository to return the same or the equivalent thereof to the proper owner or claimant.

"All dividends, stocks, and bonds and the increments thereof, all monies and credits and the increments thereof, all claims for monies and credits and the increments thereof, and all intangible personal estate or property whatsoever

and the increment thereof, held within this Commonwealth by any person for the benefit of another person shall be presumed abandoned unless claimed by the beneficiary or person entitled thereto within ten (10) years from the time the holder, trustee, debtor, or other responsible person became obligated to return the same or the equivalent thereof to the proper owner or claimant. If the increments or benefits payable on any instrument are not claimed within the time and manner prescribed in this paragraph, the instruments or evidence of the debt or obligation shall likewise be presumed abandoned. /

"All estate or property paid into any court of this Commonwealth for distribution and the increments thereof shall be presumed abandoned if not claimed within five (5) years after the estate was so paid into court, or as soon after said (5) year period as all claims filed in connection therewith shall have been disallowed or settled by the court.

"None of the provisions of this Act shall apply to bonds of counties, cities, school districts, or other tax levying subdivisions of this Commonwealth.

(1611) "Sec. 8. It shall be the duty of all state and national banks, trust companies, or other persons, and courts of this Commonwealth or the agents thereof, whether holding estates or property as bailee, depository, debtor, trustee, executor, liquidator, administrator, distributor, receiver, or other capacity coming within the purview of section 7 of this Act, to report annually to the Department of Revenue as of July 1, all property held by them declared by this Act now to be presumed abandoned, and all property which shall hereafter become presumed abandoned under the provisions of this Act. The report shall be filed in the offices of the Department of Revenue in Frankfort on or before September 1 of each year for the preceding July 1, and shall give the name of the owner, his last-known address, the amount and kind of property, and such other information as the Department of Revenue may require for the administration of this Act. Such persons or court as may have made report of any estate or property presumed abandoned, as required in this Act, shall, within four (4) months after July 1, turn over to the Department of Revenue all

property so reported; except, that if the person making such report, or any other person or persons are able to prove by competent evidence on hearing before the Commissioner of Revenue that the owner or person entitled to the property has subsequently within said four (4) months transacted business resulting in writing of record in the books of the person or court making the report, which shows the owner or person entitled to the estate or property has knowledge thereof and still claims his legal or equitable right thereto or has by other competent evidence clearly manifested such knowledge or claim, it shall not be the duty of the person or court making such report or in possession of such property to surrender it to the Department of Revenue.

(1612) "Sec. 9. Any intangible personal estate or property required by sections 7 and 8 of this Act to be liquidated so as to permit payment thereof to the Department of Revenue, shall be surrendered to the Department of Revenue and sold by the Department of Revenue at public sale at Frankfort, or in such other city in the Commonwealth as may in its judgment afford the most favorable market for the particular property involved, to the highest bidder; provided that it may decline the highest bid and reoffer the property for sale if it deems the price offered insufficient. Such sale shall be advertised at least one week before the date of the sale in a newspaper of general bona fide circulation in the county where said property was found or abandoned, and in the county where the sale is to be made, and the sale shall be held at the courthouse door.

(1613) "Sec. 10. Any person who shall transfer to the Department of Revenue, property to which the Commonwealth is entitled under the provisions of this Act, is hereby relieved of any liability to the owner of such property arising from such transfer; however, if any such person cannot be relieved of such liability by the provisions of this section, the Commonwealth shall reimburse such person for all liability to the owner of the property or estate or damage incurred by reason of compliance with the provisions of the Act.

(1614) "Sec. 11. Any person claiming an interest in estates or property paid or surrendered to the Commonwealth in accordance with the provisions of sections 3, 4, 5, or 6 of this Act, who was not actually served with notice and who did not appear, and whose claim was not considered during the action or at the proceedings which resulted in the payment of same to the Commonwealth, may within five (5) years after the judgment file his claim thereto with the Department of Revenue.

"Any person claiming an interest in estates or property paid or surrendered to the Commonwealth in accordance with sections 7, 8, or 9 of this Act, which was not subsequently adjudged under the procedure set out in section 16 of this Act to have been actually abandoned, or owned by a decedent who had no heir, distributee, devisee, or other person entitled under the laws of this Commonwealth relating to wills, descent and distribution, to take the legal or equitable title to such estate or property, may file his claim thereto at any time after same was paid to this Commonwealth.

"The claimant shall within fifteen (15) days after filing any claim permitted under this section publish notice of such claim in a newspaper of general bona fide circulation in the county in which the property was held before being transferred to the Commonwealth as herein provided. If there be no such newspaper, the claimant shall post such notice at the courthouse door and in three other conspicuous places in said county, and shall file proof of such publication or posted notice with the Department of Revenue. No such claim shall be allowed until fifteen (15) days after proof of such notice is received by the Department of Revenue at its office in Frankfort.

(1615) "Sec. 12. It shall be the duty of the Commissioner of Revenue to consider any claim and/or defense permitted to be filed before it and to hear evidenced in respect thereto. If the claimant establishes his claim, the Commissioner of Revenue shall, when the time for appeal or further legal procedure herein provided has expired, authorize payment to him of a sum equal to the same amount which was paid

into the Treasury in compliance with this Act. The decision shall be in writing and shall state the substance of the evidence heard by the Commissioner of Revenue if a transcript thereof be not kept and such decision shall be a matter of public record.

"Any person, petitioner, or claimant dissatisfied with the decision of the Commissioner of Revenue may within sixty (60) days, appeal from such decision to the Franklin Circuit Court or file an action in said court to vacate such decision. In either event the proceedings shall be de novo, and no transcript of the record before the Commissioner of Revenue shall be required to be kept unless requested by the claimant. In any such proceeding before the Franklin Circuit Court, the Commissioner of Revenue shall be made a party defendant, and all other persons required by law to be made parties defendant or plaintiff and served with actual or constructive notice in rem or quasi in rem actions shall be so treated. Any party adversely affected by the decision of the Franklin Circuit Court may appeal to the Kentucky Court of Appeals in the manner now generally provided by law, but such appeal must be commenced within sixty (60) days after the judgment. However, the Commonwealth shall in no event be required to make a supersedeas bond. The provisions of this section which relate to the decision of the Commissioner of Revenue and appeals therefrom shall also apply to a decision of the Commissioner rendered under authority of section 8 of this Act requiring payment to the Department of Revenue over the protest of the holder or claimant of the property.

(1616) "Sec. 13. Whenever any estate or property, which may be escheated under the provisions of this Act by reason of actual abandonment, or death and for presumption of death of the owner without an heir, distributee, devisee or other person entitled to take the legal or equitable title to such estate or property under the laws of this Commonwealth relating to wills, or descent and distribution, has or shall hereafter be deposited with, or in the custody of, or under the control of any court of the United States in and for any district within this Commonwealth, or in the custody of any depository, clerk or other officer of such court,

or shall have been surrendered by such court or its officers to the United States Treasury, the circuit court of this Commonwealth in any county in which such court of the United States sits, shall have jurisdiction to ascertain whether an escheat has occurred, and to enter a judgment of escheat in favor of the Commonwealth. Provided, however, this section shall not be construed as authorizing a judgment to require such courts, officers, agents, or depositories to pay or surrender such funds to the Commonwealth on a presumption of abandonment as provided in sections 7 and 8 of this Act.

(1617) *Sec. 14. To aid in the enforcement and administration of the provisions of this Act, the Attorney General shall, with the approval of the Governor, appoint an additional Assistant Attorney General, having at least the qualifications of the Sixth Assistant Attorney General, and assign him to the Department of Revenue. It shall be the special duty of such Assistant Attorney General to represent the Commonwealth at the hearings required by this Act to be held before the Commissioner of Revenue to consider claims filed pursuant to section 11 of this Act; to advise the Department of Revenue, county attorneys, and all other inquiries, with respect to questions arising under the provisions of this Act; to aid in the prosecution of all other actions or proceedings authorized by this Act when so directed by the Commissioner of Revenue or the Attorney General; and to perform such other duties as are imposed on him by any provision of this Act. Provided, however, his opinions shall be subject to the approval of the Attorney General in the same manner as is such work of other Assistant Attorney General now established by law, and he shall also have the other ordinary powers and duties of an Assistant Attorney General.

“He shall receive a salary not exceeding four thousand dollars (\$4,000) a year, to be fixed by the Attorney General and the Commissioner of Revenue as provided by law, which shall be paid on authorization of the Commissioner of Revenue in the same manner as employees of the Department of Revenue are generally paid.

(1618) "Sec. 15. All legal proceedings to enforce sections 3, 4, 5, and 6 of this Act shall be instituted on the relation of the Commissioner of Revenue.

"It shall be the duty of the county attorney of a county in which any estate or property is located, coming within the purview of sections 3, 4, 5, or 6 of this Act, to institute such legal proceedings as are necessary to enforce the provisions of said sections and to recover such sums as are due the Commonwealth thereunder. The petition and all pleadings necessary to be filed in such proceedings shall be on the relation of the Commissioner of Revenue and shall be sent to the Commissioner of Revenue for his signature and approval. The petition shall be accompanied by an affidavit of the county attorney, stating the facts on which it is based. For all other pleadings, there shall be a statement by the county attorney of the reason for the particular pleading.

"On any action or proceeding filed by a county attorney under the provisions of this Act, it shall be the duty of the Assistant Attorney General, provided for in section 14 of this Act, to offer assistance and suggestions to the county attorney in the preparation of the petition or any pleadings, and to revise and correct same as he may deem necessary, subject to the ultimate approval of the Commissioner of Revenue, when he is required to sign same.

"If the estate or property of a person coming within the purview of sections 3, 4, 5, or 6 of this Act is located in two or more counties, all such property may be included in one action or proceeding; provided, however, that the county attorneys of all counties in which such property is located may join in the prosecution of the action or proceeding, and their fees shall be determined by the amount of money derived from the property located within their respective counties when possible to determine such figure; otherwise, the courts shall determine their fees by equitable apportionment in accordance with the value of the property which is located in their respective counties.

"If the county attorney performs all the duties imposed upon him by this Act relating to enforcement of the provisions of sections 3, 4, 5, or 6, he shall be entitled to a

fee of fifteen per cent (15%) of any sum recovered in such proceeding except that the county attorney's fee shall be limited to five per cent (5%) on intangible property recovered in excess of one thousand dollars (\$1,000).

"In the event that a county attorney declines to perform the duties imposed upon him by this Act, they may be performed by the Commissioner of Revenue and the county attorney shall not be entitled to any fee. The Commissioner may, when he deems it to the best interest of the Commonwealth, institute any action authorized by this Act to be brought by the county attorney, or join the county attorney in the active prosecution of any such action. The county attorney shall be entitled to his fee in either instance if he does his duty.

"Pending the outcome of an action or court proceeding, the court may make such disposition of the land or tangible personal property involved as may seem best from the standpoints of use, rents, interest, and profits. In the event the use of the property is given to the claimant by the court, such claimant shall be held accountable for returns and profits arising from such use, if the Commonwealth be successful in such proceeding.

(1619) "Sec. 16. In the event any person refuses to pay or surrender voluntarily intangible estate or property to the Department of Revenue, as provided in sections 7 or 8 of this Act, or if the agent of any court refuses so to do, a proceeding may be brought on the relation of the Commissioner of Revenue as an equity action in a court of competent jurisdiction to force such payment or surrender of property, and all property subject to said sections 7 and 8 may be listed and included in a single action.

"If intangible estates or property are turned over to the Department of Revenue on presumption of abandonment, in accordance with sections 7, 8, or 9 of this Act, the Commissioner of Revenue may at any subsequent time institute proceedings in a court of competent jurisdiction to establish conclusively that such estate or property was actually abandoned, or that the owner thereof is dead and there are no heirs, devisees, distributees, or any other persons entitled to succeed to the title of same.

"In the event a particular person or persons may have property coming within the purview of sections 3, 4, 5, or 6 of this Act, and also sections 7 or 8 of this Act, the actions herein required to be brought by the county attorney and the Commissioner of Revenue may be joined, but joinder is not required, and if separate actions shall be brought, they shall not be considered as coming within the rule against splitting a cause of action. The county attorney shall not be charged with the duty of enforcing sections 7, 8, 9 and 12 of this Act.

"The procedure of any and all actions or proceedings permitted or necessary under this Act to be filed in a court of competent jurisdiction shall be the same as that now provided in Carroll's Kentucky Civil Code of Practice, unless provided differently herein, except that all such actions or proceedings shall be filed as equity actions.

(1620) "Sec. 17. All money received by the Department of Revenue under the provisions of this Act shall be deposited with the State Treasury and credited to the account of the General Expenditure Fund; provided, however, that ten per cent (10%) of such sum so received during the fiscal year beginning July 1, 1940, and ten per cent (10%) of such sum so received during the fiscal year beginning July 1, 1941, shall be added to and made a part of the appropriation available to the Department of Revenue for the respective fiscal years. After June 30, 1942, the legislature shall make provision for the administration of this Act in the regular budgetary appropriation made for the Department. All the expense necessary and required to be paid by the Commonwealth in administering and enforcing this Act shall be paid, out of the funds available to the Department of Revenue, and such expenses shall be paid in the same manner as other claims upon the Commonwealth are paid.

"The county attorney shall act as agent of the Department of Revenue for the collection of all judgments recovered in actions prosecuted by him under the provisions of this Act and he shall deduct the fee allowed him for his services performed pursuant to this Act, and promptly remit such collections to the Department of Revenue, with

such information relating thereto as the Department may require.

(1621) "Sec. 18. Any action permitted by this Act to be brought by the Commonwealth must be brought within fifteen (15) years from the effective date of this Act or from the time when the cause of action accrued, whichever is the later date.

(1622) "Sec. 19. Any person under disability affected by this Act shall have five (5) years after the disability is removed in which to take any action or procedure or make any defense allowed to one *sui juris*.

(1622-1) "Sec. 20. The Department of Revenue, through its employees, is also authorized to examine all records of state and national banks or trust companies, corporations, companies, partnerships, agencies, and persons where there is reason to believe that there has been or is a failure to report property which should be reported under the provisions of this Act.

"The Commissioner of Revenue shall have authority to promulgate such reasonable rules and regulations as are necessary for the enforcement of this Act, and to govern hearings provided in this Act to be held before him. Provided, however, he may delegate in writing to any regular employee of the Department of Revenue authority to perform any of the duties imposed on him by this Act excepting the promulgation of rules and regulations.

"Any person, or representative thereof refusing to make any report as required by this Act, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty dollars (\$50) or more than two hundred dollars (\$200), or imprisoned not less than thirty (30) days or more than six (6) months, or both so fined and imprisoned. The Department of Revenue shall also have authority, as herein provided, to require such reports, or the surrender of such property, by civil action, including an action in the nature of a bill of discovery, in which case such person shall be required to pay a penalty equal to ten per cent. (10%) of all amounts which he may ultimately be required to surren-

der, but in no event shall said penalty exceed five hundred dollars (\$500).

"Any person bona fide contesting the applicability of this Act to him may be relieved of the threat of any fine or penalty by posting a compliance bond in an amount and of surety sufficient to the court.

"Sec. 21. All Acts and parts of Acts in conflict with this Act are, to the extent of such conflict, hereby repealed.

"Sec. 22. It is the intent and purpose of the General Assembly of this Commonwealth of Kentucky to enact each and every provision of this Act separately, so that in the event the courts for any reason should hold any provision thereof void, or the application of any provision thereof void, then all other provisions or the application of any or all other provisions shall be deemed to remain in full force and effect; and it is hereby expressly declared that the General Assembly would have enacted any part or provision of this Act, irrespective of any other part or provision thereof.

"Approved March 1, 1940 by Governor Johnson."

EXHIBIT "D".

SEC. 8, 1942 AMENDMENT.

"It shall be the duty of all state and national banks, trust companies, or other persons, and courts of this Commonwealth or the agents thereof, whether holding estates or property as bailee, depository, debtor, trustee, executor, liquidator, administrator, distributor, receiver, or in any other capacity coming within the purview of section 7 of this Act, to report annually to the Department as of July 1, all property held by them declared by this Act to be presumed abandoned. The report shall be filed in the offices of the Department on or before September 1 of each year for the preceding July 1, and shall give the name of the owner, his last known address, the amount and kind of property, and such other information as the Department may require for the administration of this Act.

"The report shall be made in duplicate; the original shall be retained by the Department, and the copy shall be mailed to the sheriff of the county where the property is located or held. It shall be the duty of the sheriff to post said copy on the court house door or the court house bulletin board. The sheriff shall immediately certify in writing to the Department the date when said copy was posted. Said copy must be posted on or before October 1 of the year when it is made, and shall be constructive notice to all interested parties and shall be in addition to any other notice provided by statute or existing as a matter of law.

"Any person who has made a report of any estate or property presumed abandoned, as required by this Act, shall, between November 1 and November 15 of each year, turn over to the Department all property so reported; but if the person making the report or the owner of the property shall certify to the Department by sworn statement that any or all of the statutory conditions necessary to create a presumption of abandonment no longer exist or never did exist, or shall certify the existence of any fact or circumstance which has a substantial tendency to rebut such presumption, then, the person reporting or holding the property shall not be required to turn the property over to the Department except on order of court. No person shall be required to surrender any property on a presumption of abandonment to the Department if the period of time provided by any statute of limitation applicable to the owner's rights as against the holder has expired unless the court orders him to do so. If a person files an action in court claiming any property which has been reported under the provisions of this Act, the person reporting or holding such property shall be under no duty while any such action is pending to turn the property over to the Department, but shall have the duty of notifying the Department of the pendency of such action.

"The person reporting or holding the property or any claimant thereof shall always have the right to a judicial determination of his rights under this Act and nothing therein shall be construed otherwise; and the Commonwealth may institute an action to recover such property as is presumed abandoned whether it has been reported or not and may include in one petition all such property within

the jurisdiction of the court in which the action is brought provided the property of different persons is set out in separate paragraphs."

EXHIBIT "E".

Kentucky Revised Statutes.

CHAPTER 393

ESCHEATS

393.010 (1605a; 1610) CONSTRUCTION OF CHAPTER.

(1) As used in this chapter, unless the context requires otherwise:

(a) "Claim" means to demand payment or surrender of property from the person whose duty it is to pay the claimant, or surrender to him the property involved;

(b) "Commissioner" means the Commissioner of Revenue;

(c) "Department" means the Department of Revenue; and

(d) "Person" means any individual, state or national bank, partnership, joint stock company, business, trust, association, corporation, or other form of business enterprise, including a receiver, trustee or liquidating agent.

(2) This chapter does not apply to bonds of counties, cities, school districts or other tax-levying subdivisions of this state.

393.020 (1606) PROPERTY SUBJECT TO ESCHEAT.

If any property having a situs in this state has been devised or bequeathed to any person and is not claimed by that person or by his heirs, distributees or devisees within eight years after the death of the testator, or if the owner of any property having a situs in this state dies without heirs or distributees entitled to it and without disposing of it by

will, it shall vest in the state, subject to all legal and equitable demands. Also, any property abandoned by the owner, except a perfect title to a corporeal hereditament, shall vest in the state, subject to all legal and equitable demands. Any property that vests in the state under this section shall be liquidated, and the proceeds, less costs, fees and expenses incidental to all legal proceedings of the liquidation shall be paid to the department.

393.030 (1607) DISPOSITION OF PROPERTY SUBJECT TO ESCHEAT.

(1) The personal representatives of a person, any part of whose property is not distributed by will, and who died without heirs or distributees entitled to it shall settle their accounts within one year after qualifying, and pay to the department the proceeds of all personal property, first deducting the proper legal liabilities of the estate.

(2) If the whole personal property cannot be settled and the accounts closed within one year, the settlement as far as practicable, shall then be made and the proceeds paid to the department, and the residue shall be settled and paid as soon thereafter as can be properly done.

(3) The personal representative shall take possession of the real property of the decedent not disposed of by his will, and rent it out from year to year until it is otherwise legally disposed of, and pay the net proceeds to the department.

(4) The personal representative shall also make out and transmit to the department a description of the quantity, quality, and estimate value of the real property and its probable annual profits.

393.040 (1608) PROCEDURE IF LEGACY OR DEVISE IS NOT CLAIMED.

If any devisee or legatee, or his heir, devisee or distributee, has failed for eight years to claim his legacy or devise, the personal representative of the testator, or other person possessing it shall, after deducting the legal liabilities thereon, pay and deliver it, and the net profits from it to the department.

393.050 (1609) PRESUMPTION OF DEATH AFTER SEVEN YEARS; DISPOSITION OF PROPERTY.

When a person owning any property having a situs in this state is not known to be living for seven successive years, and neither he nor his heirs, devisees or distributees can be located or proved to have been living for seven successive years, he shall be presumed to have died without heirs, devisees or distributees, and his property shall be liquidated and the proceeds, less costs incident to the liquidation and any legal proceedings, and the liabilities which have been properly claimed and approved against it, shall be paid to the department.

393.060 (1610) DEPOSITS IN BANK OR TRUST COMPANY PAYABLE ON DEMAND; WHEN PRESUMED ABANDONED.

Any deposit, (legal, beneficial, equitable or otherwise) payable on demand in any bank or trust company in this state, together with the interest thereon shall be presumed abandoned unless the owner has, within ten successive years next preceding the date as of which reports are required by KRS 393.110:

(1) Negotiated in writing with the bank or trust company concerning it;

(2) Been credited with interest on the passbook or certificate of deposit on his request;

(3) Had a transfer, disposition of interest or other transaction noted of record in the books or records of the bank or trust company; or

(4) Increased or decreased the amount of the deposit.

393.070 (1610) DEPOSITS NOT PAYABLE ON DEMAND; WHEN PRESUMED ABANDONED.

Any deposit (legal, beneficial, equitable or otherwise) other than those payable on demand in any bank or trust company in this state, together with the interest thereon, shall be presumed abandoned unless the owner has, within twenty-five successive years next preceding the date as of which reports are required by KRS 393.110:

(1) Negotiated in writing with the bank or trust company concerning it;

(2) Been credited with interest on the passbook or certificate of deposit on his request;

(3) Had a transfer, disposition of interest or other transaction noted of record in the books or records of the bank or trust company; or

(4). Increased or decreased the amount of the deposit.

393.080 (1610) DEPOSITS FOR SECURITY; WHEN PRESUMED ABANDONED.

Any deposit of money, stocks, bonds or other credits made to secure payment for services rendered or to be rendered, or to guarantee the performance of services or duties, or to protect against damage or harm, and the increments thereof, shall be presumed abandoned unless claimed by the person entitled thereto within ten years after the occurrence of the event that would obligate the holder or depository to return it or its equivalent.

393.090 (1610). INTANGIBLE PERSONAL PROPERTY HELD FOR ANOTHER; BENEFITS ON ANY INSTRUMENT; WHEN PRESUMED ABANDONED.

All dividends, stocks, bonds, money, credits and claims for money and credits; and all intangible personal property, and the increments of any of them, held in this state by any person for the benefit of another shall be presumed abandoned unless claimed by the beneficiary or person entitled thereto within ten years from the time the holder, trustee, debtor, or other responsible person became obligated to return them or their equivalent to the proper owner or claimant. If the increments or benefits payable on any instrument are not claimed within the time prescribed in this section, the instrument or evidence of the debt or obligation shall likewise be presumed abandoned.

393.100 (1610) PROPERTY PAID INTO COURT; WHEN PRESUMED ABANDONED.

Any property paid into any court of this state for distribution, and the increments thereof, shall be presumed

abandoned if not claimed within five years after the date of payment into court, or as soon after the five-year period as all claims filed in connection with it have been disallowed or settled by the court.

393.110 (1611) HOLDERS OF ABANDONED PROPERTY TO REPORT TO DEPARTMENT; POSTING OF NOTICES; DUTY TO SURRENDER PROPERTY TO DEPARTMENT; RIGHTS OF ACTION.

(1) It shall be the duty of all state and National banks, trust companies, or other persons, and courts of this Commonwealth or the agents thereof, whether holding estates or property as bailee, depository, debtor, trustee, executor, liquidator, administrator, distributor, receiver, or in any other capacity coming within the purview of KRS 393.060 to 393.100, to report annually to the department as of July 1, all property held by them declared by this chapter to be presumed abandoned. The report shall be filed in the offices of the department on or before September 1 of each year for the preceding July 1, and shall give the name of the owner, his last known address, the amount and kind of property, and such other information as the department may require for the administration of this chapter. The report shall be made in duplicate; the original shall be retained by the department, and the copy shall be mailed to the sheriff of the county where the property is located or held. It shall be the duty of the sheriff to post said copy on the courthouse door or the courthouse bulletin board. The sheriff shall immediately certify in writing to the department the date when said copy was posted. Said copy must be posted on or before October 1 of the year when it is made, and shall be constructive notice to all interested parties and shall be in addition to any other notice provided by statute or existing as a matter of law.

(2) Any person who has made a report of any estate or property presumed abandoned, as required by this chapter, shall, between November 1 and November 15 of each year, turn over to the department all property so reported; but if the person making the report or the owner of the property shall certify to the department by sworn statement

that any or all of the statutory conditions necessary to create a presumption of abandonment no longer exist or never did exist, or shall certify the existence of any fact or circumstance which has a substantial tendency to rebut such presumption, then, the person reporting or holding the property shall not be required to turn the property over to the department except on order of court. No person shall be required to surrender any property on a presumption of abandonment to the department if the period of time provided by any statute of limitation applicable to the owner's rights as against the holder has expired unless the court orders him to do so. If a person files an action in court claiming any property which has been reported under the provisions of this chapter, the person reporting or holding such property shall be under no duty while any such action is pending to turn the property over to the department, but shall have the duty of notifying the department of the pendency of such action.

(3) The person reporting or holding the property or any claimant thereof shall always have the right to a judicial determination of his rights under this chapter and nothing therein shall be construed otherwise; and the Commonwealth may institute an action to recover such property as is presumed abandoned whether it has been reported or not and may include in one petition all such property within the jurisdiction of the court in which the action is brought provided the property of different persons is set out in separate paragraphs. (1942, c. 156, § § 1, 2)

393.120 (1612) SALE OF ABANDONED PROPERTY

Any intangible personal property required by KRS 393.060 to 393.110 to be liquidated so as to permit payment to the department, shall be surrendered to the department and sold by it to the highest bidder at public sale at Frankfort, or in whatever city in the state affords, in its judgment, the most favorable market for the particular property involved. The department may decline the highest bid and reoffer the property for sale if it considers the price offered insufficient. The sale shall be advertised at least one week

in advance in a newspaper of general bona fide circulation in the county where the property was found or abandoned, and in the county where the sale is to be made. The sale shall be held at the courthouse door.

393.130 (1613) TRANSFEROR TO DEPARTMENT RELIEVED OF LIABILITY.

Any person who transfers to the department property to which the state is entitled under this chapter shall be relieved of any liability to the owner arising from that transfer. The state shall reimburse any person who cannot be relieved of such liability by this section for all liability to the owner of the property or estate or damage incurred by reason of compliance with this chapter.

393.140 (1614) CLAIM OF INTEREST IN PROPERTY SURRENDERED TO STATE.

(1) Any person claiming an interest in any property paid or surrendered to the state in accordance with KRS 393.020 to 393.050 who was not actually served with notice, and who did not appear, and whose claim was not considered during the action or at the proceedings that resulted in its payment to the state, may, within five years after the judgment, file his claim to it with the department.

(2) Any person claiming an interest in any estate or property paid or surrendered to the state in accordance with KRS 393.060 to 393.120, that was not subsequently adjudged under the procedure set out in KRS 393.230 to have been actually abandoned, or owned by a decedent who had no heir, distributee, devisee or other person entitled under the laws of this state relating to wills, descent and distribution to take the legal or equitable title, may file his claim to it at any time after it was paid to this state.

(3) The claimant shall, within fifteen days after filing any claim permitted under this section, publish notice of the claim in a newspaper of general bona fide circulation in the county in which the property was held before being transferred to the state. If there is no such newspaper, the claimant shall post the notice at the courthouse door and

in three other conspicuous places in that county, and shall file proof of publication or posted notice with the department. No such claim shall be allowed until fifteen days after proof of the notice is received by the department at its offices in Frankfort.

"Bona fide circulation" defined, KRS 424.010

393.150 (1615) COMMISSIONER TO DETERMINE CLAIMS.

The commissioner shall consider any claim or defense permitted to be filed before the department and hear evidence concerning it. If the claimant establishes his claim, the commissioner shall, when the time for appeal or further legal procedure has expired, authorize payment to him of a sum equal to the amount paid into the State Treasury in compliance with this chapter. The decision shall be in writing and shall state the substance of the evidence heard by the commissioner, if a transcript is not kept. The decision shall be a matter of public record.

393.160 (1615) APPEALS FROM DECISION OF COMMISSIONER.

Any person dissatisfied with the decision of the commissioner may, within sixty days, appeal from it to the Franklin Circuit Court or file an action in that court to vacate the decision. In either event the proceedings shall be de novo, and no transcript of the record before the commissioner shall be required to be kept unless requested by the claimant. In such proceeding the commissioner shall be made a party defendant, and all other persons required by law to be made parties in actions in rem or quasi in rem shall be made parties. Any party adversely affected by the decision of the Franklin circuit court may appeal to the Court of Appeals within sixty days after the judgment. Upon an appeal the state shall not be required to make a supersedeas bond. The provisions of this section relating to the decision of the commissioner and appeals therefrom shall also apply to a decision of the commissioner rendered under authority of KRS 393.110.

**393.170 (1616) PROPERTY IN FEDERAL CUSTODY;
DETERMINATION OF WHETHER ESCHEAT HAS
OCCURRED.**

Whenever any property escheated under this chapter by reason of actual abandonment, or death or presumption of death of the owner without leaving any person entitled to take the legal or equitable title under the laws of this state relating to wills, or descent and distribution, has been deposited with, or in the custody or under the control of, any Federal court in and for any district in this state, or in the custody of any depository, clerk or other officer of such court, or has been surrendered by such court or its officers to the United States Treasury, the circuit court of any county in which such Federal court sits shall have jurisdiction to ascertain whether an escheat has occurred, and to enter a judgment of escheat in favor of the state. This section does not authorize a judgment to require such courts, officers, agents or depositories to pay or surrender funds to this state on a presumption of abandonment as provided in KRS 393.060 to 393.110.

**393.180 (1618) PROCEEDINGS INSTITUTED BY
COUNTY ATTORNEY ON RELATION OF COMMIS-
SIONER.**

Any legal proceeding to enforce KRS 393.020 to 393.050 and to recover any sum due the state thereunder shall be instituted, on the relation of the commissioner, by the county attorney of the county in which any such property is located. The petition and all necessary pleadings shall be sent to the commissioner for his signature and approval. The petition shall be accompanied by an affidavit of the county attorney, stating the facts on which it is based. For all other pleadings, there shall be a statement by the county attorney of the reason for the particular pleading.

**393.190 (1618) ASSISTANT ATTORNEY-GENERAL
TO AID COUNTY ATTORNEY.**

On any action filed by a county attorney under the provisions of this chapter, the assistant Attorney-General pro-

vided for in KRS 15.140 shall offer assistance and suggestions to the county attorney in the preparation of the petition or any pleadings, and revise and correct them as he considers necessary, subject to the ultimate approval of the commissioner, when he is required to sign them.

393.200 (1618) COMPENSATION OF COUNTY ATTORNEY; COMMISSIONER MAY PERFORM HIS DUTIES.

If the county attorney performs all the duties imposed upon him by this chapter relating to enforcement of KRS 393.020 to 393.050 he shall be entitled to a fee of fifteen percent of any sum recovered in the proceeding, but shall be limited to five percent on intangible property recovered in excess of one thousand dollars. If the county attorney declines to perform the duties imposed upon him by this chapter, they may be performed by the commissioner, and the county attorney shall not be entitled to any fee. When he considers it to the best interest of the state, the commissioner may institute any action authorized by this chapter to be brought by the county attorney, or join the county attorney in the active prosecution of any such action. The county attorney shall be entitled to his fee in either instance if he does his duty.

Assistant Attorney-General assigned to Department of Revenue, KRS 15.140.

393.210 (1618) PROPERTY IN TWO OR MORE COUNTIES; COMPENSATION OF COUNTY ATTORNEYS.

If the property of a person coming within the purview of KRS 393.020 to 393.050 is located in two or more counties, all the property may be included in one action. The county attorneys of all counties in which such property is located may join in the prosecution of the proceeding. Their fees shall be determined by the amount of money derived from the property located within their respective counties when possible to determine that figure. Otherwise, the courts shall determine their fees by equitable apportionment in accordance with the value of the property located in their respective counties.

393.220 (1618) DISPOSITION OF TANGIBLE PROPERTY DURING PROCEEDING.

Pending the outcome of an action, the court may make such disposition of the land or tangible personal property involved as it considers best from the standpoints of use, rents, interest and profits. If the use of the property is given to the claimant by the court, he shall be held accountable for returns and profits arising from it if the state is successful in the proceeding.

393.230 (1619) PROCEEDING TO FORCE PAYMENT OF INTANGIBLE PROPERTY: TO ESTABLISH ACTUAL ABANDONMENT.

(1) If any person or the agent of any court refuses to pay or surrender intangible property to the department as provided in KRS 393.060 to 393.110, an equitable proceeding may be brought on the relation of the commissioner to force payment or surrender. All property subject to KRS 393.060 to 393.110 may be listed and included in a single action.

(2) If any intangible property is turned over to the department on presumption of abandonment, in accordance with KRS 393.060 to 393.120, the commissioner may at any subsequent time institute proceedings to establish conclusively that it was actually abandoned, or that the owner has died and there is no person entitled to it.

393.240 (1619) ACTIONS MAY BE JOINED: SHALL BE IN EQUITY.

(1) If any person has property coming within the purview of KRS 393.020 to 393.050, and also of KRS 393.060 to 393.110, the actions required to be brought by the county attorney and the commissioner may be joined, but joinder is not required, and if separate actions are brought, they shall not be considered as coming within the rule against splitting a cause of action. The county attorney is not charged with the duty of enforcing sections KRS 393.060 to 393.120, 393.150 or 393.160.

(2) The procedure for all actions under this chapter shall be filed as equity actions and follow the procedure provided by the Civil Code of Practice, unless otherwise provided in this chapter.

393.250 (1620) EXPENSES, HOW PAID; COUNTY ATTORNEY TO COLLECT JUDGMENTS, DEDUCT FEE.

(1) Any necessary expense required to be paid by the state in administering and enforcing this chapter shall be paid out of appropriations made to the department.

(2) The county attorney shall act as agent of the department for the collection of all judgments recovered in actions prosecuted by him under this chapter. He shall deduct the fee allowed him and promptly remit the remainder to the department with such information relating thereto as the department requires.

393.260 (1621) LIMITATION OF STATE'S ACTION.

Any action brought by the state under this chapter shall be brought within fifteen years from June 12, 1940 or from the time when the cause of action accrued, whichever is the later date.

393.270 (1622) PERSON UNDER DISABILITY; EXTENSION.

Any person under disability affected by this chapter shall have five years after the disability is removed in which to take any action or procedure or make any defense allowed to one *sui juris*.

393.280 (1622-1) EXAMINATION OF RECORDS; PROMULGATION OF RULES; DELEGATION OF COMMISSIONER'S AUTHORITY.

(1) The department, through its employees, may examine all records of any person where there is reason to believe that there has been or is a failure to report property that should be reported under this chapter.

(2) The commissioner may promulgate any reasonable and necessary rules for the enforcement of this chapter, and govern hearings held before him. He may delegate in writ-

ing to any regular employe of the department authority to perform any of the duties imposed on him by this chapter, except the promulgation of rules.

393.290 (1622-1) CIVIL ACTION TO ENFORCE PRODUCTION OF REPORTS, SURRENDER OF PROPERTY.

(1) The department may require the production of reports, or the surrender of property as provided in this chapter by civil action, including an action in the nature of a bill of discovery, in which case the defendant shall pay a penalty equal to ten percent of all amounts that he is ultimately required to surrender. This penalty shall not exceed five hundred dollars.

(2) Any person who in good faith contests the applicability of this chapter to him may be relieved of the threat of any penalty by posting a compliance bond in an amount and of surety sufficient to the court.

393.300 (1623-1) RESTRICTION ON ESCHEAT OF REAL PROPERTY HELD BY LENDING CORPORATION UNDER SUPERVISION.

No person shall institute proceedings to escheat real property the title to which was acquired by any lending corporation in satisfaction of debts previously contracted in the course of its business, or that it purchases under a judgment for any such debt in its favor, if such lending corporation is under the supervision of the Division of Banking of this state, Comptroller of Currency of the United States or any other duly constituted supervising banking authority, state or Federal, without first obtaining the consent of the supervising authority having supervision over that corporation.

393.990 (1622-1) PENALTIES.

Any person who refuses to make any report as required by this chapter shall be fined not less than fifty dollars nor more than two hundred dollars, or imprisoned for not less than thirty days nor more than six months, or both.

Supreme Court of the United States

October Term, 1943.

No. 154.

ANDERSON NATIONAL BANK, Suing on Behalf of
Itself and All Others Similarly Situated, - - - Appellants,

versus

H. CLYDE REEVES, Individually and as Commis-
sioner of Revenue of the State of Kentucky, Etc.,
Et Al., - - - - - Appellees.

APPEAL FROM THE COURT OF APPEALS OF
THE STATE OF KENTUCKY.

BRIEF FOR APPELLANTS.

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November 22, 1943.

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Supreme Court of the United States

October Term, 1943.

No. 154.

ANDERSON NATIONAL BANK, SUING ON BE-
HALF OF ITSELF AND ALL OTHERS SIMI-
LARLY SITUATED, - - - - - *Appellants,*

v.

H. CLYDE REEVES, INDIVIDUALLY AND AS
COMMISSIONER OF REVENUE OF THE STATE
OF KENTUCKY, ETC., ET AL., - - - *Appellees.*

APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF KENTUCKY.

BRIEF FOR APPELLANTS.

OPINIONS BELOW.

There are two opinions of the Court of Appeals of Kentucky in this case. The first opinion is officially reported in 293 Ky. 735, 170 S. W. (2d) 350 and may be found at R. 53. The second opinion is officially reported in 294 Ky. 674, 172 S. W. (2d) 575 and may be found at R. 89. The second opinion is a mere application of Kentucky's "law of the case rule" to the

effect that on a subsequent appeal the court is "bound by the opinion on the first appeal whether it be right or wrong."

JURISDICTION.

The judgment of the Kentucky Court of Appeals under review was entered June 15, 1943 (R. 89). The appeal was granted by the Chief Justice of that court on June 18, 1943 (R. 94). Probable jurisdiction was noted October 11, 1943.

The jurisdiction of this Court to review by direct appeal the judgment complained of is conferred by Section 237a of the Judicial Code as amended by the Act of February 13, 1925, 28 U. S. C. A., Section 344(a).

STATUTES INVOLVED.

The statutes involved are Kentucky Revised Statutes 393.010 and 393.060 to 393.990, inclusive.¹ They are a part of the Kentucky Escheat Act of 1940 as amended in 1942. The entire Escheat Act as contained in the Revised Statutes is copied in the Appendix beginning at page 43. It is hereafter referred to as the Escheat Act.

¹When this suit was filed Carroll's Kentucky Statutes, Baldwin's 1936 Revision and the Supplements thereto, were the official edition of the Kentucky Statutes. Therefore, the pleadings and the May 8, 1942 judgment of the Franklin Circuit Court referred to such statutes 1605a to 1622-1. During the first appeal to the Kentucky Court of Appeals, the Kentucky Revised Statutes became the official statutes of Kentucky. Therefore, the first opinion of the Court of Appeals dated December 18, 1942, and all subsequent judgments, orders and opinions refer to the Kentucky Revised Statutes. The Revised Statutes are a rewrite and re-grouping of the former Carroll's Statutes.

These statutes create a new kind of escheat in Kentucky, *i. e.*, escheat on account of alleged abandonment. Generally speaking, they provide: (a) That demand and time deposits in national and state banks which have been inactive for 10 and 25 years respectively are presumed abandoned; (b) national and state banks, under threat of penalty, are required to report such presumed abandoned deposits to the state Department of Revenue; (c) national and state banks (again under threat of penalty) are required to voluntarily turn over such deposits to the Department of Revenue without suit, notice to the owner,² hearing or judicial decree. There are similar provisions covering unclaimed debts of every kind and all unclaimed personal property held by one person for the benefit of another.

The Escheat Act attempts to relieve the banks and others from liability to the owner and provides a procedure for the owner to secure the return of his money or property.

QUESTIONS PRESENTED.

1. Does not the Escheat Act in escheating or taking deposits from national banks on account of inactivity violate the National Banking Act?

2. Does not the Escheat Act in escheating or taking presumed abandoned deposits from national and state banks and presumed abandoned property from

²The 1942 amendment provided that a copy of the report should be posted on the court house door or bulletin board and should be constructive notice. The Court of Appeals held however that this notice was not necessary.

others without suit, effective notice to the owner, hearing or judicial decree violate the due process clause of the Fourteenth Amendment?

STATEMENT.

The Anderson National Bank is a national banking association with its place of business in Lawrenceburg, Kentucky (R. 2). In August, 1940, it filed suit in the Franklin Circuit Court to enjoin the operation of the 1940 Escheat Act in so far as it related to the escheat of inactive deposits. This 1940 Act is copied in the Appendix at page 56. The suit was a representative one "for all others similarly situated," *i. e.*, all national and state banks and all others required by the 1940 Act to report and to voluntarily surrender inactive bank deposits and other property which the 1940 Act declared "presumed abandoned" (R. 10). The defendants are the officers of the State charged with the administration and enforcement of the Escheat Act.

In January, 1942, the Circuit Court entered an order holding unconstitutional those sections relating to the reporting and surrender of inactive bank deposits and other presumed abandoned property. The order of the Circuit Court provides in part:

"2. That Sections 7, 8 and 9 of the Kentucky Escheat Act of 1940, being Sections 1610, 1611 and 1612 of Carroll's Kentucky Statutes, 1940 Supplement, and each of them are unconstitutional. And Sections 16 and 20 of said Act (Ky. St. 1619 and 1622-1) and each of them are unconstitutional in so

far as they relate to the enforcement or administration of Sections 7, 8 or 9 (Ky. St. 1610, 1611 and 1612) * * *

After this decision the General Assembly of Kentucky at its 1942 session amended Section 8 of the 1940 Act by providing, among other things, that a copy of the report of inactive and therefore presumed abandoned deposits and other property should be posted on the court house door or bulletin board and be constructive notice to all concerned. The amendment further provided, "and the Commonwealth may institute an action to recover such property as is presumed abandoned * * *." The 1942 amendment is copied in the Appendix beginning at page 70. The defendants, by amended petition, pleaded the 1942 amendment (R. 42). Thereafter the circuit court by order dated May 8, 1942 (R. 45) again held that the Escheat Act violated the due process clause in requiring the surrender of inactive bank deposits and other presumed abandoned property without suit, hearing or judicial decree. The order permanently enjoined the defendant state officers and all others from requiring the Anderson National Bank or any of those for whom it sued to turn over to the Department of Revenue of Kentucky any presumed abandoned property without first obtaining an order of a court of competent jurisdiction.

³This order was entered when Carroll's Kentucky Statutes were still the official publication. Ky. St. 1610-11-12 referred to in the Court's order are now K.R.S. 393.060, 393.070, 393.080, 393.090, 393.100, 393.110 and 393.120 and Ky. St. 1619 and 1622-1 are now K.R.S. 393.230 and 393.290 and 393.990.

For ready reference and for a comparison of section numbers, the Act as it appeared in the then official statutes is copied in the Appendix beginning at page 56.

The effect of the order of the circuit court was to permit the state after suit and judgment to escheat deposits from national banks on account of inactivity or dormancy.

Anderson National Bank prosecuted an appeal to the Court of Appeals of Kentucky from so much of the circuit court judgment as held the Escheat Act applicable to national banks. The defendants prosecuted a cross-appeal from so much of the judgment as required suit and judgment before the state could escheat or take presumed abandoned property.

The Court of Appeals in an opinion dated December 18, 1942 (R. 53, 293 Ky. 735, 170 S. W. (2d) 350) held (1) that the Act permitting the state to escheat or take deposits from national banks on account of inactivity does not violate the National Banking Act, (2) that the Act authorizing the state to require, by threat of penalty, the voluntary surrender of inactive bank deposits and other presumed abandoned property without suit, hearing or judicial decree does not violate the due process clause of the Fourteenth Amendment. The court therefore affirmed the case on the original appeal; reversed it on the cross-appeal and remanded it to the circuit court with directions to enter a judgment in conformity with the opinion. A petition for rehearing was filed (R. 64) and overruled without opinion (R. 86).

On the return of the case to the circuit court that court in obedience to the mandate of the Court of Appeals entered judgment holding that the Kentucky Escheat Act as amended, "being K.R.S. 393.010 through

393.990 * * *, as applied to the plaintiff, Anderson National Bank, suing on behalf of itself and all others similarly situated is valid and is not in conflict with the National Banking Act or with the Due Process Clause of the state constitution or of the Fourteenth Amendment of the Constitution of the United States" (R. 87).

The case was then again appealed to the Court of Appeals and that court on June 15, 1943, rendered its second opinion and order (R. 89, 294 Ky. 674, 172 S. W. (2d) 575) affirming the judgment of the circuit Court.

SPECIFICATION OF ERRORS.

The Court of Appeals of Kentucky erred:

(1) In holding that the Kentucky Escheat Act of 1940, being K.R.S. 393.010 through 393.990 (formerly Carroll's Kentucky Statutes 1605-a through 1622-1, as amended by Chapter 156 of the Act of the General Assembly of 1942), and which provide that demand and time deposits in national and state banks which have been dormant or inactive for ten and twenty-five years, respectively, and that all other personal property held within Kentucky by any person for the benefit of another and which has been unclaimed for a period of ten years are presumed abandoned and must be reported to the Department of Revenue of Kentucky, and, under heavy penalty, must be voluntarily turned over to the Department of Revenue, are valid and constitutional.

(2) In holding that said statutes as construed by the Court of Appeals of Kentucky as requiring national banks, under heavy penalty, to voluntarily turn over to the Department of Revenue deposits on account of inactivity or dormancy do not violate the National Banking Act.

(3) In holding that the said statutes as construed by the Court of Appeals of Kentucky as requiring all banks, under heavy penalty, to voluntarily and without suit or judicial decree turn over to the Department of Revenue deposits on account of inactivity or dormancy do not violate the due process clause of the Fourteenth Amendment of the Constitution of the United States.

(4) In holding that said statutes as construed by the Court of Appeals as requiring all persons in Kentucky who hold personal property for the benefit of another, and which has been unclaimed for a period of ten years must, under heavy penalty, voluntarily turn over such property to the Department of Revenue without suit, notice or judicial decree are not violative of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

(5) In holding that the State of Kentucky can take or escheat deposits in national banks on account of inactivity or dormancy.

(6) In holding that the State of Kentucky can take or escheat deposits in any bank on account of inactivity or dormancy without notice to the owner of such deposits and without suit or judicial decree.

(7) In holding that the State of Kentucky can take or escheat personal property held by any person for the benefit of another and which is unclaimed without notice to the owner of such property and without suit and judicial decree.

(8) In holding that the State of Kentucky can require national or state banks or other persons who hold property for the benefit of another to hand over such property to the state or to any of its agencies without notice to the owner of such property and without judicial decree.

(9) In holding that, "the portions of the Act dealing with dormant bank deposits do not provide for a seizure of the deposits and vesting of title or ownership in the State but merely for a transfer of property."

(10) In holding that "the controversial portions of the Act are reasonable (as to the time provided as well as to the procedure), and that they would not constitute a deprivation of property without due process of law in violation of the Constitution of the United States even in the absence of the provision requiring notice to be posted at the court house door."

(11) In holding that "there is no unwarranted interference with such (national) banks, and no frustration of the purposes of national legislation concerning them such as to render the Act invalid as to them."

ARGUMENT.

1. A state cannot take deposits from a national bank on account of inactivity or dormancy.

2. It is violative of the due process clause of the Fourteenth Amendment for a state, under threat of penalty, to require national and state banks and others to voluntarily surrender inactive bank deposits or other presumed abandoned property without suit, effective notice to the owner, hearing and judicial decree.

Before discussing the above points we give a brief summary of the pertinent parts of the Escheat Act.

It is a comprehensive piece of legislation covering the subject of escheat and repealed prior escheat laws of Kentucky. In addition, it created a new kind of escheat, *i. e.*, escheat on account of abandonment. This case involves only those sections dealing with escheat for abandonment. Such sections are briefly as follows:⁴

K.R.S. 393.010 (d) (1605a) defines "person" to mean a "state or national bank" and others.

393.060 (1610)⁵ declares that any deposit payable on demand "shall be presumed abandoned unless the owner has, within" the 10 preceding years had some written transaction with the bank regarding the deposit.

⁴The entire Act is copied in the Appendix beginning at page 43.

⁵The numbers in parentheses are the section numbers in Carroll's Kentucky Statutes which were the official statutes when the suit was filed and until the case was in the Court of Appeals for the first time.

"393.060 (1610) DEPOSITS IN BANK OR TRUST COMPANY PAYABLE ON DEMAND; WHEN PRESUMED ABANDONED.

"Any deposit (legal, beneficial, equitable or otherwise), payable on demand in any bank or trust company in this state, together with the interest thereon shall be presumed abandoned unless the owner has, within ten successive years next preceding the date as of which reports are required by KRS 393.110:

"(1) Negotiated in writing with the bank or trust company concerning it;

"(2) Been credited with interest on the pass-book or certificate of deposit on his request;

"(3) Had a transfer, disposition of interest or other transaction noted of record in the books or records of the bank or trust company; or

"(4) Increased or decreased the amount of the deposit."

393.070 (1610) has the same provisions for all other deposits, *i. e.*, savings accounts, time deposits, etc., except that the time is 25 years instead of 10.

393.080 (1610) provides that deposits of money, stocks, bonds or other credits to secure payment for services shall be presumed abandoned unless claimed within 10 years.

"393.080 (1610) DEPOSITS FOR SECURITY; WHEN PRESUMED ABANDONED.

"Any deposit of money, stocks, bonds or other credits made to secure payment for services rendered or to be rendered, or to guarantee the performance of services or duties, or to protect against

damage or harm, and the increments thereof, shall be presumed abandoned unless claimed by the person entitled thereto within ten years after the occurrence of the event that would obligate the holder or depository to return it or its equivalent."

393.090 (1610) provides that all dividends, credits, claims and all intangible personal property held by any person for the benefit of another shall be presumed abandoned unless claimed within ten years.

"393.090 (1610) INTANGIBLE PERSONAL PROPERTY HELD FOR ANOTHER; BENEFITS ON ANY INSTRUMENT; WHEN PRESUMED ABANDONED.

"All dividends, stocks, bonds, money, credits and claims for money and credits, and all intangible personal property, and the increments of any of them, held in this state by any person for the benefit of another shall be presumed abandoned unless claimed by the beneficiary or person entitled thereto within ten years from the time the holder, trustee, debtor, or other responsible person became obligated to return them or their equivalent to the proper owner or claimant. If the increments or benefits payable on any instrument are not claimed within the time prescribed in this section, the instrument or evidence of the debt or obligation shall likewise be presumed abandoned."

393.100 (1610) creates a presumption of abandonment of any property paid into any court of the state if not claimed within five years.

393.110 (1611) makes it the duty of all state and national banks and others to report annually to the

Department of Revenue of Kentucky on or before September 1 as of July 1, "all property held by them declared by this chapter to be presumed abandoned." A copy of the report is to be mailed to the Sheriff whose duty it is to post such copy on the court house door or bulletin board. Such posted report "shall be constructive notice to all interested parties."

This section also provides that any "person" who has made a report shall (with certain exceptions not now material), "between November 1 and November 15 of each year, turn over to the Department all property so reported."

This section does not require suit before the escheat or taking of the bank deposits or other property, but provides merely that "and the Commonwealth *may*⁶ institute an action to recover such property as is presumed abandoned," and may include in one petition all such property within the jurisdiction of the court.

For ready reference the above section requiring the voluntary surrender of bank deposits and other presumed abandoned property is copied herewith.

"393.110 (1611) HOLDERS OF ABANDONED PROPERTY TO REPORT TO DEPARTMENT; POSTING OF NOTICES; DUTY TO SURRENDER PROPERTY TO DEPARTMENT; RIGHTS OF ACTION.

"(1) It shall be the duty of all state and National banks, trust companies, or other persons, and courts of this Commonwealth or the agents thereof, whether holding estates or property as bailee, depository, debtor, trustee, executor,

⁶Italics ours throughout.

liquidator, administrator, distributor, receiver, or in any other capacity coming within the purview of KRS 393.060 to 393.100, to report annually to the department as of July 1, all property held by them declared by this chapter to be presumed abandoned. The report shall be filed in the offices of the department on or before September 1 of each year for the preceding July 1, and shall give the name of the owner, his last known address, the amount and kind of property, and such other information as the department may require for the administration of this chapter. The report shall be made in duplicate; the original shall be retained by the department, and the copy shall be mailed to the sheriff of the county where the property is located or held. It shall be the duty of the sheriff to post said copy on the courthouse door or the courthouse bulletin board. The sheriff shall immediately certify in writing to the department the date when said copy was posted. Said copy must be posted on or before October 1 of the year when it is made, and shall be constructive notice to all interested parties and shall be in addition to any other notice provided by statute or existing as a matter of law.

“(2) Any person who has made a report of any estate or property presumed abandoned, as required by this chapter, shall, between November 1 and November 15 of each year, turn over to the department all property so reported; but if the person making the report or the owner of the property shall certify to the department by sworn statement that any or all of the statutory conditions necessary to create a presumption of abandonment no longer exist or never did exist, or shall

certify the existence of any fact or circumstance which has a substantial tendency to rebut such presumption, then, the person reporting or holding the property shall not be required to turn the property over to the department except on order of court. No person shall be required to surrender any property on a presumption of abandonment to the department if the period of time provided by any statute of limitation applicable to the owner's rights as against the holder has expired unless the court orders him to do so. If a person files an action in court claiming any property which has been reported under the provisions of this chapter, the person reporting or holding such property shall be under no duty while any such action is pending to turn the property over to the department, but shall have the duty of notifying the department of the pendency of such action.

"(3) The person reporting or holding the property or any claimant thereof shall always have the right to a judicial determination of his rights under this chapter and nothing therein shall be construed otherwise; and the Commonwealth may institute an action to recover such property as is presumed abandoned whether it has been reported or not and may include in one petition all such property within the jurisdiction of the court in which the action is brought provided the property of different persons is set out in separate paragraphs (1942, c. 156, §§1, 2)."

393.290 (1622-1) provides a 10% penalty up to \$500.00 for a failure to voluntarily surrender the presumed abandoned bank deposits and other property. There is a provision that a person contesting the ap-

plicability of the Act in good faith may be relieved of the penalty by posting a compliance bond.

"393.290 (1622-1) CIVIL ACTION TO ENFORCE PRODUCTION OF REPORTS, SURRENDER OF PROPERTY.

"(1) The department may require the production of reports, or the surrender of property as provided in this chapter by civil action, including an action in the nature of a bill of discovery, in which case the defendant shall pay a penalty equal to ten percent of all amounts that he is ultimately required to surrender. This penalty shall not exceed five hundred dollars.

"(2) Any person who in good faith contests the applicability of this chapter to him may be relieved of the threat of any penalty by posting a compliance bond in an amount and of surety sufficient to the court."

393.990 (1622-1) imposes a fine of not less than \$50.00 nor more than \$200.00 or an imprisonment of not less than 30 days or more than 6 months, or both, for a failure to make the report of presumed abandoned property.

393.130 (1613) attempts to relieve the person who surrenders the property from liability to the owner.

393.140 (1614) gives any person whose property has been turned over to the state, and where such property has not been adjudged to have been actually abandoned, as provided in 393.230, the right to file a claim for the return of the property. However, in contrast with the taking by the state without notice or suit, the claimant

is required within 15 days after filing his claim to publish a notice of the claim in a newspaper, or if there is no newspaper, to post a notice and to file with the Department of Revenue proof of publication or posted notice.

“393.140. (1614) CLAIM OF INTEREST IN PROPERTY SURRENDERED TO STATE. :

“(2) Any person claiming an interest in any estate or property paid or surrendered to the state in accordance with KRS 393.060 to 393.120, that was not subsequently adjudged under the procedure set out in KRS 393.230 to have been actually abandoned, or owned by a decedent who had no heir, distributee, devisee or other person entitled under the laws of this state relating to wills, descent and distribution to take the legal or equitable title, may file his claim to it at any time after it was paid to this state.

“(3) The claimant shall, within fifteen days after filing any claim permitted under this section, publish notice of the claim in a newspaper of general bona fide circulation in the county in which the property was held before being transferred to the state. If there is no such newspaper, the claimant shall post the notice at the courthouse door and in three other conspicuous places in that county, and shall file proof of publication or posted notice with the department. No such claim shall be allowed until fifteen days after proof of the notice is received by the department at its offices in Frankfort.

“‘Bona fide circulation’ defined, KRS 424.010.”

393.150 (1615). The Commissioner of Revenue is given authority, if the claimant establishes his claim, to authorize payment.

393.160 (1615). If the claimant is dissatisfied with the decision of the Commissioner, he may appeal within 60 days to the Franklin Circuit Court and from that court to the Court of Appeals.

393.170 (1616) provides that there is no presumption of abandonment as to money or property in the custody of a Federal court and no requirement for the voluntary surrender of such property. However, the circuit court of the county is given jurisdiction to declare an escheat of money or property in a Federal court on account of actual abandonment or death without heirs or distributees.

393.230 (2) (1619) provides that where any property is turned over to the state on presumption of abandonment, the Commissioner of Revenue "may at any subsequent time institute proceedings to establish conclusively that it was actually abandoned or that the owner had died and there is no person entitled to it."

393.230 (1619) PROCEEDING TO FORCE PAYMENT OF INTANGIBLE PROPERTY; TO ESTABLISH ACTUAL ABANDONMENT.

"(2) If any intangible property is turned over to the department on presumption of abandonment, in accordance with KRS 393.060 to 393.120; the commissioner may at any subsequent time institute proceedings to establish conclusively that it was actually abandoned, or that the owner has died and there is no person entitled to it."

From the above it is apparent that:

(a) Demand deposits in national and state banks that have been inactive for 10 years and savings accounts that have been inactive for 25 years are presumed abandoned.

(b) National and state banks, under threat of a fine and jail sentence, or both, are required to report such presumed abandoned deposits.

(c) National and state banks, under threat of a 10% penalty, are required to voluntarily turn such presumed abandoned deposits over to the state without suit, effective notice to the owner, hearing or judicial decree.

We now discuss the points of law stated above.

A State Cannot Escheat or Take Deposits From a National Bank on Account of Inactivity.

This Court has held in the only cases before it on the subject that it would be violative of the National Banking Act for a state to escheat or take deposits from national banks on account of inactivity.

First National Bank of San Jose v. California, 262 U. S. 366.

The above is the first case to reach this Court where a state attempted to escheat or take, by whatever name it might be called, deposits from a national bank on account of inactivity. The period of time in the California statute was twenty years and the California

statute provided all of the safeguards required by due process—suit, notice to the depositor by newspaper publication for four weeks, hearing and a judicial decree.⁷

This Court, reversing the Supreme Court of California, held that it would be a violation of the National Banking Act to permit a state to thus interfere with a deposit in a national bank. The opinion is in part as follows:

p. 368. "Section 5136, U. S. Revised Statutes, confers upon national banks power to receive deposits, which necessarily impiles the right to accept loans of money, promising to repay upon demand to lender or his order. These banks are instrumentalities of the Federal Government. Their contracts and dealings are subject to the operation of general and undiscriminating state laws which do not conflict with the letter or the general object and purposes of congressional legislation. But any attempt by a State to define their duties or control the conduct of their affairs is void whenever it conflicts with the laws of the United States or frustrates the purposes of the national legislation or impairs the efficiency of the bank to discharge the duties for which it was created. *Davis v. Elmira Savings Bank*, 161 U. S. 275, 283, 288, 290.

"National banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end * * * being such

⁷*Securities Savings Bank v. California*, 263 U. S. 282, 284.

means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is "an abuse, because it is the usurpation of power which a single State cannot give." *Farmers' and Mechanics' National Bank v. Dearing*, 91 U. S. 29, 33, 34.

"Congressional legislation in respect of national banks 'has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the States.' *Easton v. Iowa*, 188 U. S. 220, 229.

Plainly, no State may prohibit national banks from accepting deposits or directly impair their efficiency in that regard. And we think, under circumstances like those here revealed, a State may not dissolve contracts of deposit even after twenty years and require national banks to pay to it the amounts then due; the settled principles stated above oppose such power.

"Does the statute conflict with the letter or general object and purposes of the legislation by Congress? Obviously, it attempts to qualify in an unusual way agreements between national banks and their customers long understood to arise when the former receive deposits under their plainly granted powers. If California may thus interfere other States may do likewise; and, instead of twenty years, varying limitations may be prescribed—three years perhaps, or five, or

ten, or fifteen. We cannot conclude that Congress intended to permit such results. They seem incompatible with the purpose to establish a system of governmental agencies specifically empowered and expected freely to accept deposits from customers irrespective of domicile with the commonly consequent duties and liabilities. The depositors of a national bank often live in many different States and countries; and certainly it would not be an immaterial thing if the deposits of all were subject to seizure by the State where the bank happened to be located. The success of almost all commercial banks depends upon their ability to obtain loans from depositors, and these might well hesitate to subject their funds to possible confiscation.

"This Court has often pointed out the necessity for protecting federal agencies against interference by state legislation. The approved principle of *obsta principiis* should be adhered to. *McCulloch v. Maryland*, 4 Wheat. 316; *Osborn v. United States Bank*, 9 Wheat. 738; *Farmers' and Mechanics' National Bank v. Dearing*, *supra*; *California v. Central Pacific R. R. Co.*, 127 U. S. 1; *Davis v. Elmira Savings Bank*, *supra*; *Easton v. Iowa*, *supra*; *Covington v. First National Bank*, 198 U. S. 100; *Farmers and Mechanics Savings Bank v. Minnesota*, 232 U. S. 516; *Choctaw, Oklahoma & Gulf R. R. Co. v. Harrison*, 235 U. S. 292; *Bank of California v. Richardson*, 248 U. S. 476. "Reversed."

The above decision by this Court has been followed in every case without exception, except the present case now on appeal.

Security Savings Bank v. California, 263 U. S. 282.

In this case California was attempting to take deposits from state banks under the same statutes that were involved in the national bank case above. This Court, in an opinion by Mr. Justice Brandeis, held that the statute was valid as to state banks and reaffirmed its decision in the San Jose case above that it was invalid as to national banks.

The opinion states:

p. 284. “* * * The question for decision is whether the statutes violate rights guaranteed a state bank by the Federal Constitution.² * * *”

The footnote at the bottom of the page is:

“²That the statutes are invalid as applied to national banks was settled in *First National Bank v. California*, 262 U. S. 366.”

National City Bank v. Philippine Islands, 302 U. S. 651.

This case involved a statute of the Philippine Islands which escheated deposits from national and state banks on account of inactivity. The Supreme Court of the Philippines had held the statute valid as to national banks, 63 Philippine Reports, 1056.

In a *Per Curiam* opinion this Court said:

“The judgment of the Supreme Court of the Philippines is reversed and the judgment of the Court of First Instance of Manila, dated the 24th

day of July, 1934, is affirmed upon the authority of *First National Bank v. California*, 262 U. S. 366, * * *

Starr, Attorney General, v. O'Connor, Comptroller of the Currency, et al., 118 F. (2d) 548 (6 C. C. A.).
Certiorari denied, 314 U. S. 695.

p. 556. "(9) But, after careful consideration of the authorities mentioned, we have reached the conclusion that none of these cases gainsay the direct and controlling applicability to the instant situation of the doctrine of *First National Bank of San Jose v. California*, *supra*, impelling decision that Michigan escheat procedure, as heretofore detailed, constitutes an unlawful interference with the liquidation of a national bank.

* * * * *

p. 557. "A State Supreme Court in our circuit recently followed the authority of the San Jose case and denied, in its applicability to national banks, the constitutionality of a statute requiring the delivery to the state of all bank deposits which have remained inactive for fifteen years, or, in the case of savings funds and time deposits, for twenty-five years. *American National Bank of Nashville v. Clarke*, Sup't of Banks, decided February 3, 1940, 175 Tenn. 480, 135 S. W. (2d) 935. Compare *National City Bank of New York v. Philippine Islands*, 302 U. S. 651, 58 S. Ct. 269, 82 L. Ed. 504, which also cited and followed the San Jose bank case, *supra*."

* * * * *

American National Bank of Nashville, et al., v. Clarke, Superintendent of Banks, 135 S. W. (2d) 935, 175 Tenn. 480.

In this case the Supreme Court of Tennessee, on the authority of *First National Bank of San Jose v. California*, 262 U. S. 366, held invalid as to national banks a Tennessee statute which attempted to escheat deposits in national banks that had been inactive for fifteen years.

7 *Am. Jur., Banks and Banking*, p. 291, Sec. 415.

"State statutes providing for the escheat of unclaimed bank deposits cannot, however, have any application to deposits in national banks. Such statutes, if applied to those banks, would interfere with the Federal instrumentality in such a way as to conflict with the general object and purpose of legislation by Congress in establishing the national bank system."

9 *C. J. S., Banks and Banking*, Sec. 694, p. 1255.

"*Escheat.* State statutes providing for the escheat of unclaimed deposits to the state after the lapse of a specified period of time cannot validly apply to deposits in national banks doing business within the state. * * *

Of course, a state can escheat a deposit in a national bank where there has been a judicial determination of death intestate without heirs or any other judicial determination showing that there is no present owner of

the property. National banks every day recognize court orders regarding executors, administrators, committees, receivers, etc.

Our point is that a state cannot regulate a national bank by prescribing how long national banks can retain deposits whether active or inactive. In *First National Bank of San Jose v. California*, 262 U. S. 366, this Court pointed out the danger of permitting state interference with deposits in national banks:

p. 370. "If California may thus interfere other states may do likewise; and, instead of twenty years, varying limitations may be prescribed—three years perhaps, or five, or ten, or fifteen. We cannot conclude that Congress intended to permit such results."

The California statute was 20 years—the Kentucky statute has already cut this to 10 years.

Congress, by not limiting the time during which a depositor can leave an inactive account in a national bank, meant that national banks had power to retain deposits as long as the depositor desired to leave it there. The Kentucky statute does not proceed on the theory that there is no owner of the deposit. It proceeds on the theory that the owner is alive and because he has left the account inactive the Kentucky statute presumes that the deposit has been abandoned. A state may not thus interfere with national banks.

It Is Violative of the Due Process Clause of the Fourteenth Amendment for a State, Under Threat of Penalty, to Require National and State Banks and Others to Voluntarily Surrender Inactive Bank Deposits or Other Presumed Abandoned Property Without Suit, Effective Notice to the Owner, Hearing and Judicial Decree.

This Court has consistently held that suit, effective notice, hearing and judicial decree are necessary before a state can escheat or take property.

Security Savings Bank v. California, 263 U. S. 282.

This is the case in which this Court upheld as to state banks the California statute which the Court had condemned as to national banks. In commenting on the suit, notice, hearing and judicial decree in the California statute the opinion by Mr. Justice Brandeis said:

p. 284. "The procedural provision is this: The suit is brought by the attorney general in Sacramento County. Upon the bank, personal service must be made. Upon the depositors, service is to be made by publication of the summons for four weeks in a newspaper of general circulation published in that county. With the summons a notice must also be published requiring all persons other than the named defendants, to appear and show cause why the moneys involved in the suit shall not be deposited with the state treasurer. Any person interested may become a party to the suit. The judgment to be entered requires the banks to forthwith deposit

all such moneys with the state treasurer, to be received, invested, accounted for and paid out in the same manner and by the same officers as is provided in the case of other escheated property.' For a period of five years after entry of the judgment any person not a 'party or privy' to it may sue the State to recover the money so received. In the case of infants and persons of unsound mind, the period is extended for one year after removal of the disability. Code of Civil Procedure, Sec. 1272."

p. 287. " * * * In either case the essentials of jurisdiction over the deposits are that there be seizure of the *res* at the commencement of the suit; and *reasonable notice and opportunity to be heard*. Compare *Pennoyer v. Neff*, 95 U. S. 714, 724; *Freeman v. Alderson*, 119 U. S. 185, 187; *Arndt v. Griggs*, 134 U. S. 316; *Overby v. Gordon*, 177 U. S. 214, 231. These requirements are satisfied by the procedure prescribed in the statutes of California. There is a seizure or its equivalent. And the published summons to the depositors named *as parties defendant* is supplemented by the notice directed to all claimants whomsoever. * * *"

p. 288. "The statutory service is reasonable; and the court is required to hear any one who may appear in the suit. * * *"

Cunnius v. Reading School District, 198 U. S. 458.

This case involved a Pennsylvania law relating to the grant of letters of administration upon estates of persons presumed to be dead by reason of long absence. Before an administrator could be appointed the statute required newspaper notice, a hearing in the orphans

court and a finding by that court that the legal presumption of death had been established.

Mrs. Smith had a dower interest in her husband's land for life. She had been absent for nine years and her son had been granted letters of administration. He had collected interest and had given a receipt therefor. Mrs. Smith sued to recover the amount paid the administrator during her absence. This Court decided that the several weeks' notice required by the Pennsylvania statute was reasonable to confer jurisdiction on the state court to make an adjudication and affirmed a decision for the defendant. This Court said:

p. 477. "Let it be further conceded, as we also think is essential, that a state law which did not provide adequate notice as prerequisite to the proceedings for the administration of the estate of an absentee would also be repugnant to the 14th Amendment."

Provident Institution for Savings v. Malone, 221 U. S. 660.

Massachusetts had an act which provided that deposits in savings banks which had been inactive and unclaimed for thirty years should be paid to the Treasurer and the Receiver General. However, the Massachusetts statute which this Court approved as to a state bank provided that the inactive bank deposit should not be taken until after there had been public notice, order and decree. Furthermore, after the state acquired the deposit pursuant to the notice, hearing and judicial decree it held it "as trustee for the owner"

and paid the owner 3% interest from the time the deposit was paid to the state. As to due process this Court said:

p. 664. "The statute here is reasonable in its terms and is so framed as to work injustice to no one. It only applies to cases where no deposit has been made, no interest added on pass-book, no check drawn against the account, for thirty years, and where no claimant is known and the depositor cannot be found. *Before the money can be turned over to the receiver general proceedings must be instituted in the Probate Court, and, under the decision of the Supreme Court of the State, personal notice must be given to the bank and citation and notice, usual in the Probate Court, published, so as to give the depositor, if living, and his heirs, if dead, opportunity to appear and be heard. Even then the property is not escheated, but deposited with the treasurer to hold as trustee for the owner or his legal representatives, to whom it is payable when they establish their right.*"

In its first opinion the Kentucky Court of Appeals said (R. 58):

"* * * As said by the Supreme Court in *Provident Institution for Savings v. Malone*, 221 U. S. 660, 31 S. Ct. 661, 55 L. Ed. 899, 31 L. R. S. (N. S.) 1129, in discussing a somewhat similar statute. * * *

It is submitted that the Kentucky Escheat Act, which escheats inactive bank deposits without suit, effective notice, hearing or judicial decree, and which

pays no interest to the owner, and which pays the deposit into the general state funds instead of holding it "as trustee" for the owner, is entirely different and not "somewhat similar" to the Massachusetts statute considered by this Court in the above case.

Hamilton v. Brown, 161 U. S. 256.

This case presented a controversy between claimants of property in Texas. The plaintiffs were heirs of a former owner and the defendant asserted title from the State of Texas which was based upon escheat proceedings. With reference to due process before escheat this Court said:

p. 275. "When a man dies, the legislature is under no constitutional obligation to leave the title to his property, real or personal, in abeyance for an indefinite period; but it may provide for promptly ascertaining, *by appropriate judicial proceedings*, who has succeeded to his estate. If such proceedings are had, *after actual notice by service of summons to all known claimants, and constructive notice by publication to all possible claimants who are unknown*, the final determination of the right of succession, either among private persons, as in the ordinary administration of estates, or between all persons and the State, as by inquest of office or similar process to determine whether the estate has escheated to the public, is *due process of law*; * * *"

The Act purports to have been passed for the protection of the depositors. Quite the contrary is true.

It is essentially a revenue measure, the purpose of which is to get money for the state.

1. The depositors are given *no hearing* whatever before their money is required to be paid over to the state.

2. After the circuit court held the Act in its original form to be invalid in part because it provided no notice to the depositors, the 1942 amendment was added to provide the most ineffectual kind of notice by merely posting a list of "presumed abandoned" accounts at the courthouse door. The Court of Appeals held that even this notice was not essential.

3. When the money is received by the state it is not held as a trust fund or for safe keeping, but is deposited in the general expenditure fund so that it can be *spent* immediately for general purposes.

4. Although the depositors may file claims with the state to recover their deposits, they must "turn square corners" and go to considerable expense since the proceedings must be in the State Capital and individual newspaper notice is required to be published for each claim within 15 days after the claim is made.

Manifestly, many of the deposits will be small and it will not be worth while to incur the necessary expense to recover them back from the state. Every facility, including the imposition of severe penalties, is provided for the collection of the money by the state: severe obstacles stand in the way of recovering it back from the state.

The whole theory of the Act shows that the state is not taking over the deposits for the benefit of the

depositors. The pretext for the taking is that the owners have *abandoned* their deposits. If such is the case, they would naturally not seek to recover them back. This clearly shows that the Act was not passed for the protection of the depositors.

It will not do to say that the depositors are not harmed by the taking. Due process guarantees freedom of contract. They may wish to keep their deposits in the banks because they are stockholders or for some other reasons of their own. The state may remain solvent, but there is the possibility that it may (a) repudiate its obligations or (b) fail to make any appropriations to pay them or, (c) in the future, object to being sued.

The Kentucky Constitution provides that the state's indebtedness shall not exceed \$500,000 (Ky. Const. §49). If any indebtedness in excess of that amount is incurred, such excess is void. When the money is paid over to the state, the state at most becomes a debtor. If the debt exceeds, together with other state indebtedness, the sum of \$500,000 the obligation to pay will be void. Despite the probable state solvency, there are many reasons why the depositors may object to the substitution of the state as their debtor.

As to both national and state banks the Kentucky Escheat Act is violative of the due process clause of the Fourteenth Amendment.

**The State Court's Construction of the Kentucky
Escheat Act Is Not Controlling.**

Carmichael v. Southern Coal Co., 301 U. S. 495.

p. 508. "While the particular name which a state court or legislature may give to a money payment commanded by its statute is not controlling here when its constitutionality is in question, *cf.* *Educational Films Co. v. Ward*, 282 U. S. 379, 387; *Storaasli v. Minnesota*, 283 U. S. 57, 62; *Wagner v. Covington*, 251 U. S. 95, 102; *Standard Oil Co. v. Graves*, 249 U. S. 389, 394, we see no reason to doubt that the present statute is an exertion of the taxing power of the state. *Cf.* *Carley & Hamilton v. Snook*, 281 U. S. 66, 71."

Educational Films Corp. v. Ward, 282 U. S. 379.

This case involved the validity of the New York corporate franchise tax. In determining for itself the nature of the tax this Court said:

p. 387. "But the nature of a tax must be determined by its operation rather than by particular descriptive language which may have been applied to it. As was said in *Macallen Co. v. Massachusetts*, 279 U. S. 620, 625, 626, '* * * neither state courts nor legislatures, by giving the tax a particular name, or by using some form of words, can take away our duty to consider its nature and effect * * * this Court must determine for itself by independent inquiry whether the tax here is what, in form and by the decision of the state court, it is declared to be * * *'"

The Opinions of the Court of Appeals of Kentucky.

The Kentucky Court of Appeals held that the Escheat Act did not conflict with the National Banking Act and was not violative of the due process clause of the Fourteenth Amendment. The second opinion of the court states these holdings as follows (R. 89, Appendix, p. 72):

"We are bound by the opinion on the first appeal, whether it be right or wrong, under our familiar law of the case rule. We have considered the contentions (1) that the Act in question conflicts with the National Banking Act and (2) that it is violative of the due process clause of the 14th Amendment to the Federal Constitution and find the contentions without merit."

The first opinion of the state court (R. 53, Appendix, p. 73) gives that court's reasons for the above holding and for its conclusion that the decision of this Court in *First National Bank of San Jose v. California*, 262 U. S. 366, is not applicable. These reasons are:

(a) The state court holds that under the Escheat Act the escheat or taking of inactive bank deposits and other presumed abandoned property is not an "escheat" but something else. The state court softens the taking by calling it "transfer of property."

It is our position that the name given to the escheat or taking is unimportant.

The state court's reason for the new name given the escheat is because the owner is given the right to file a claim for the return of the property.

(b) The reason given by the state court for disregarding the decision of this Court in *First National Bank of San Jose v. California*; 262 U. S. 366, is because of the state court's conclusion that this Court's decision was based solely and only on the ground that under the California statute the owner of the inactive bank deposit could not file a claim or suit for the recovery of his property.

In each of the above reasons and conclusions the state court is wrong because:

(1) It was alleged in the original petition (R. 8) and nowhere denied by the defendant state officers that: "It is the plan and purpose of the defendants and of the Commonwealth of Kentucky, unless enjoined and restrained by this Court, immediately and as necessity requires to spend any and all money turned over to the Department of Revenue or the State Treasury under the Escheat Act of 1940, and not to segregate or set aside or keep any part of such money as a trust or other fund for the benefit of the owners or claimants thereto."

(2) Since the state takes and spends the inactive bank deposits and other presumed abandoned property it makes no difference to the national bank as an instrumentality of the Federal Government and it makes no difference to the owner of the inactive deposit whether the taking by the state is called by its true name of "escheat" or whether the taking is softened by calling it a "transfer of property."

(3) The state court has misinterpreted this Court's decision in *First National Bank of San Jose v. Cali-*

for *nia*, 262 U. S. 366. That case was not based on whether or not the owner could file a claim for the return of the deposit. This is evidenced by the following from that opinion:

p. 370. "If California may thus interfere other states may do likewise; and instead of twenty years, varying limitations may be prescribed—three years perhaps, or five, or ten, or fifteen. We cannot conclude that Congress intended to permit such results."

The vice in the California statute which this Court said constituted an interference with the National Banking Act was the attempt by California to say how long a national bank could retain a deposit whether active or inactive.

Furthermore, the opinion of this Court in *Security Savings Bank v. California*, 263 U. S. 282, where the same California statute was held valid as to state banks, shows that this Court was not concerned with whether the owner could get his deposit back or not. Mr. Justice Brandeis' opinion states:

p. 290. "In the opinion below it was suggested that the statute may be construed as permitting a depositor, although named as defendant in the attorney general's suit, to make claim against the State, under §1272, at any time within five years (or the extended period) after final judgment, if he did not appear in the suit. As no depositor had appeared, the point was not passed upon; and the state court expressly left open the rights of

depositors and their privies in respect to escheat. State v. Security Savings Bank, 186 Cal. 419, 431. *We have no occasion to consider them."*

(4) Under the theory of the Kentucky Court of Appeals the state is permitted to do in two steps what this Court in the California case prohibited a state from doing in one step. That is, under the California statute, which this Court held invalid as to national banks, the escheat of deposits in national banks on account of inactivity was accomplished in one step—suit, effective notice, hearing and judicial decree.

Under the theory of the Kentucky court this same result is accomplished in two steps. *First*, national banks are put out of the picture by calling the escheat a "transfer of property." *Second*, with the national banks eliminated the Kentucky Escheat Act provides that the state "may at any subsequent time institute proceedings to establish conclusively that it was actually abandoned * * *" (K. R. S. 393.230 (2)). After these proceedings the Kentucky court would undoubtedly concede that there had been an escheat.

In other words, immediately after Kentucky has acquired possession of inactive deposits in national banks by the so-called "transfer of property," and thereby gotten rid of the national bank feature, the state as a second step institutes proceedings for the judicial determination of escheat.

The Kentucky court cannot be right in holding that it is legal to do in two steps what would be illegal to do in one step. In the petition for rehearing this feature

of the opinion was called to the attention of the Kentucky court (R. 64, 65).

(5) In attempting to differentiate the Kentucky Escheat Act from the California statute the Kentucky court in its first opinion seems to think there can be no confiscation unless title has passed.

When the state takes deposits from national banks on account of inactivity and commingles it in its general funds and spends it, it makes no practical difference to the national bank or to the depositor whether there has been a technical passage of title or not. Also there can be confiscation without the passage of title.

Chicago, R. I. & P. Ry. Co. v. U. S., 284 U. S. 80.

p. 96. "Confiscation may result from a taking of the use of property without compensation quite as well as from the taking of the title."

(6) The right of an owner to recover escheated property in Kentucky is not something new. It did not begin, as one might suppose, with the 1940 Escheat Act as to "presumed abandoned property." On the contrary, it has been the law in Kentucky for more than 100 years, or since 1842, that the owner of escheated property could recover the property.¹⁰ Furthermore, prior to the 1940 Escheat Act there was no such thing as an escheat or taking of property until after suit,

¹⁰In the Court of Appeals of Kentucky we filed as a separate appendix to the brief a copy of every Kentucky Escheat Act since 1798 to show the correctness of this statement. It is not thought necessary to encumber this record with all of these statutes since neither the court nor counsel for appellees controverted the above statement.

notice, hearing and a judicial decree (except escheat on account of alienage).

So the right of the owner to recover inactive bank deposits and other "presumed abandoned property" in the 1940 Escheat Act does not differentiate the escheat of such bank deposits by the state from prior Kentucky escheat laws relating to land or anything else.

(7) As stated, the 1940 Escheat Act, which was subsequently written into the Kentucky Revised Statutes, was a complete law on the subject of escheat and repealed prior laws on escheat. The Escheat Act does not justify the construction given it by the state court. The word "escheat" is used several times in the Act. The words "transfer of property" appear nowhere in the Act. The title to the Act is:

"An Act relating to all classes of property actually or presumptively subject to *escheat*; providing the terms upon which presumption of abandonment of property and presumption of the death of persons shall be determined; providing how and when said property may be *escheated* to the Commonwealth of Kentucky, providing for the reduction of all such property to cash, transferring the possession of same to the Treasurer of Kentucky; providing how any person who is legally entitled thereto may recover same from the Treasurer: * * * (R. 18).

CONCLUSION.

Because the Kentucky Escheat Act is violative of the National Banking Act as regards national banks and violative of the due process clause of the Fourteenth Amendment as regards national and state banks and others, this Court is asked to reverse the judgment of the Court of Appeals of Kentucky.

Respectfully submitted,

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November 22, 1943.

APPENDIX.

Kentucky Revised Statutes.

CHAPTER 393

ESCHEATS

393.010 (1605a; 1610) CONSTRUCTION OF CHAPTER.

(1) As used in this chapter, unless the context requires otherwise:

(a) "Claim" means to demand payment or surrender of property from the person whose duty it is to pay the claimant, or surrender to him the property involved;

(b) "Commissioner" means the Commissioner of Revenue;

(c) "Department" means the Department of Revenue; and

(d) "Person" means any individual, state or national bank, partnership, joint stock company, business, trust, association, corporation, or other form of business, enterprise, including a receiver, trustee or liquidating agent.

(2) This chapter does not apply to bonds of counties, cities, school districts or other tax-levying subdivisions of this state.

393.020 (1606) PROPERTY SUBJECT TO ESCHEAT.

If any property having a situs in this state has been devised or bequeathed to any person and is not claimed by that person or by his heirs, distributees or devisees within eight years after the death of the testator, or if the owner of any property having a situs in this state dies without heirs or distributees entitled to it and without disposing of it by will, it shall vest in the state, subject to all legal and equitable demands. Also, any property abandoned by the owner, except a perfect title to a corporeal hereditament, shall vest in the state, subject to all legal and equitable demands. Any property that vests in the state under this section shall be liquidated, and the proceeds, less costs, fees and expenses incidental to all legal proceedings of the liquidation shall be paid to the department.

393.030 (1607) DISPOSITION OF PROPERTY SUBJECT TO ESCHEAT.

(1) The personal representatives of a person, any part of whose property is not distributed by will, and who died without heirs or distributees entitled to it shall settle their accounts within one year after qualifying, and pay to the department the proceeds of all personal property, first deducting the proper legal liabilities of the estate.

(2) If the whole personal property cannot be settled and the accounts closed within one year, the settlement as far as practicable, shall then be made and the proceeds paid to the department, and the residue shall be settled and paid as soon thereafter as can be properly done.

(3) The personal representative shall take possession of the real property of the decedent not disposed of by his will, and rent it out from year to year until it is otherwise legally disposed of, and pay the net proceeds to the department.

(4) The personal representative shall also make out and transmit to the department a description of the quantity, quality, and estimate value of the real property and its probable annual profits.

393.040 (1608) PROCEDURE IF LEGACY OR DEVISE IS NOT CLAIMED.

If any devisee or legatee, or his heir, devisee or distributee, has failed for eight years to claim his legacy or devise, the personal representative of the testator, or other person possessing it shall, after deducting the legal liabilities thereon, pay and deliver it, and the net profits from it to the department.

393.050 (1609) PRESUMPTION OF DEATH AFTER SEVEN YEARS; DISPOSITION OF PROPERTY.

When a person owning any property having a situs in this state is not known to be living for seven successive years, and neither he nor his heirs, devisees or distributees can be located or proved to have been living for seven successive years, he shall be presumed to have died without heirs, devisees or distributees, and his property shall be

liquidated and the proceeds, less costs incident to the liquidation and any legal proceedings, and the liabilities which have been properly claimed and approved against it, shall be paid to the department.

393.060 (1610) DEPOSITS IN BANK OR TRUST COMPANY PAYABLE ON DEMAND; WHEN PRESUMED ABANDONED.

Any deposit, (legal, beneficial, equitable or otherwise) payable on demand in any bank or trust company in this state, together with the interest thereon shall be presumed abandoned unless the owner has, within ten successive years next preceding the date as of which reports are required by KRS 393.110:

- (1) Negotiated in writing with the bank or trust company concerning it;
- (2) Been credited with interest on the passbook or certificate of deposit on his request;
- (3) Had a transfer, disposition of interest or other transaction noted of record in the books or records of the bank or trust company; or
- (4) Increased or decreased the amount of the deposit.

393.070 (1610) DEPOSITS NOT PAYABLE ON DEMAND; WHEN PRESUMED ABANDONED.

Any deposit (legal, beneficial, equitable or otherwise) other than those payable on demand in any bank or trust company in this state, together with the interest thereon, shall be presumed abandoned unless the owner has, within twenty-five successive years next preceding the date as of which reports are required by KRS 393.110:

- (1) Negotiated in writing with the bank or trust company concerning it;
- (2) Been credited with interest on the passbook or certificate of deposit on his request;
- (3) Had a transfer, disposition of interest or other transaction noted of record in the books or records of the bank or trust company; or
- (4) Increased or decreased the amount of the deposit.

393.080 (1610) DEPOSITS FOR SECURITY; WHEN PRESUMED ABANDONED.

Any deposit of money, stocks, bonds or other credits made to secure payment for services rendered or to be rendered, or to guarantee the performance of services or duties, or to protect against damage or harm, and the increments thereof, shall be presumed abandoned unless claimed by the person entitled thereto within ten years after the occurrence of the event that would obligate the holder or depository to return it or its equivalent.

393.090 (1610) INTANGIBLE PERSONAL PROPERTY HELD FOR ANOTHER; BENEFITS ON ANY INSTRUMENT; WHEN PRESUMED ABANDONED.

All dividends, stocks, bonds, money, credits and claims for money and credits, and all intangible personal property, and the increments of any of them, held in this state by any person for the benefit of another shall be presumed abandoned unless claimed by the beneficiary or person entitled thereto within ten years from the time the holder, trustee, debtor, or other responsible person became obligated to return them or their equivalent to the proper owner or claimant. If the increments or benefits payable on any instrument are not claimed within the time prescribed in this section, the instrument or evidence of the debt or obligation shall likewise be presumed abandoned.

393.100 (1610) PROPERTY PAID INTO COURT; WHEN PRESUMED ABANDONED.

Any property paid into any court of this state for distribution, and the increments thereof, shall be presumed abandoned if not claimed within five years after the date of payment into court, or as soon after the five-year period as all claims filed in connection with it have been disallowed or settled by the court.

393.110 (1611) HOLDERS OF ABANDONED PROPERTY TO REPORT TO DEPARTMENT; POSTING OF NOTICES; DUTY TO SURRENDER PROPERTY TO DEPARTMENT; RIGHTS OF ACTION.

(1) It shall be the duty of all state and National banks, trust companies, or other persons, and courts of this Com-

monwealth or the agents thereof, whether holding estates or property as bailee, depository, debtor, trustee, executor, liquidator, administrator, distributor, receiver, or in any other capacity coming within the purview of KRS 393.060 to 393.100, to report annually to the department as of July 1, all property held by them declared by this chapter to be presumed abandoned. The report shall be filed in the offices of the department on or before September 1 of each year for the preceeding July 1, and shall give the name of the owner, his last known address, the amount and kind of property, and such other information as the department may require for the administration of this chapter. The report shall be made in duplicate; the original shall be retained by the department, and the copy shall be mailed to the sheriff of the county where the property is located or held. It shall be the duty of the sheriff to post said copy on the courthouse door or the courthouse bulletin board. The sheriff shall immediately certify in writing to the department the date when said copy was posted. Said copy must be posted on or before October 1 of the year when it is made, and shall be constructive notice to all interested parties and shall be in addition to any other notice provided by statute or existing as a matter of law.

(2) Any person who has made a report of any estate or property presumed abandoned, as required by this chapter, shall, between November 1 and November 15 of each year, turn over to the department all property so reported; but if the person making the report or the owner of the property shall certify to the department by sworn statement that any or all of the statutory conditions necessary to create a presumption of abandonment no longer exist or never did exist, or shall certify the existence of any fact or circumstance which has a substantial tendency to rebut such presumption, then, the person reporting or holding the property shall not be required to turn the property over to the department except on order of court. No person shall be required to surrender any property on a presumption of abandonment to the department if the period of time provided by any statute of limitation applicable to the owner's rights as against the holder has expired unless the court orders him to do so. If a person files an action in

court claiming any property which has been reported under the provisions of this chapter, the person reporting or holding such property shall be under no duty while any such action is pending to turn the property over to the department, but shall have the duty of notifying the department of the pendency of such action.

(3) The person reporting or holding the property or any claimant thereof shall always have the right to a judicial determination of his rights under this chapter and nothing therein shall be construed otherwise; and the Commonwealth may institute an action to recover such property as is presumed abandoned whether it has been reported or not and may include in one petition all such property within the jurisdiction of the court in which the action is brought provided the property of different persons is set out in separate paragraphs (1942, c. 156, § § 1, 2)

393.120 (1612) SALE OF ABANDONED PROPERTY.

Any intangible personal property required by KRS 393.060 to 393.110 to be liquidated so as to permit payment to the department, shall be surrendered to the department and sold by it to the highest bidder at public sale at Frankfort, or in whatever city in the state affords, in its judgment, the most favorable market for the particular property involved. The department may decline the highest bid, and reoffer the property for sale if it considers the price offered insufficient. The sale shall be advertised at least one week in advance in a newspaper of general bona fide circulation in the county where the property was found or abandoned, and in the county where the sale is to be made. The sale shall be held at the courthouse door.

393.130 (1613) TRANSFEROR TO DEPARTMENT RELIEVED OF LIABILITY.

Any person who transfers to the department property to which the state is entitled under this chapter shall be relieved of any liability to the owner arising from that transfer. The state shall reimburse any person who cannot be relieved of such liability by this section for all liability to the owner of the property or estate or damage incurred by reason of compliance with this chapter.

393.140 (1614) CLAIM OF INTEREST IN PROPERTY SURRENDERED TO STATE.

(1) Any person claiming an interest in any property paid or surrendered to the state in accordance with KRS 393.020 to 393.050 who was not actually served with notice, and who did not appear, and whose claim was not considered during the action or at the proceedings that resulted in its payment to the state, may, within five years after the judgment, file his claim to it with the department.

(2) Any person claiming an interest in any estate or property paid or surrendered to the state in accordance with KRS 393.060 to 393.120, that was not subsequently adjudged under the procedure set out in KRS 393.230 to have been actually abandoned, or owned by a decedent who had no heir, distributee, devisee or other person entitled under the laws of this state relating to wills, descent and distribution to take the legal or equitable title, may file his claim to it at any time after it was paid to this state.

(3) The claimant shall, within fifteen days after filing any claim permitted under this section, publish notice of the claim in a newspaper of general bona fide circulation in the county in which the property was held before being transferred to the state. If there is no such newspaper, the claimant shall post the notice at the courthouse door and in three other conspicuous places in that county, and shall file proof of publication or posted notice with the department. No such claim shall be allowed until fifteen days after proof of the notice is received by the department at its offices in Frankfort.

"Bona fide circulation" defined, KRS 424.010

393.150 (1615) COMMISSIONER TO DETERMINE CLAIMS.

The commissioner shall consider any claim or defense permitted to be filed before the department and hear evidence concerning it. If the claimant establishes his claim, the commissioner shall, when the time for appeal or further legal procedure has expired, authorize payment to him of a sum equal to the amount paid into the State Treasury in compliance with this chapter. The decision shall be in

writing and shall state the substance of the evidence heard by the commissioner, if a transcript is not kept. The decision shall be a matter of public record.

393.160 (1615) APPEALS FROM DECISION OF COMMISSIONER.

Any person dissatisfied with the decision of the commissioner may, within sixty days, appeal from it to the Franklin Circuit Court or file an action in that court to vacate the decision. In either event the proceedings shall be de novo, and no transcript of the record before the commissioner shall be required to be kept unless requested by the claimant. In such proceeding the commissioner shall be made a party defendant, and all other persons required by law to be made parties in actions in rem or quasi in rem shall be made parties. Any party adversely affected by the decision of the Franklin circuit court may appeal to the Court of Appeals within sixty days after the judgment. Upon an appeal the state shall not be required to make a supersedeas bond. The provisions of this section relating to the decision of the commissioner and appeals therefrom shall also apply to a decision of the commissioner rendered under authority of KRS 393.110.

393.170 (1616) PROPERTY IN FEDERAL CUSTODY; DETERMINATION OF WHETHER ESCHEAT HAS OCCURRED.

Whenever any property escheated under this chapter by reason of actual abandonment, or death or presumption of death of the owner without leaving any person entitled to take the legal or equitable title under the laws of this state relating to wills, or descent and distribution, has been deposited with, or in the custody or under the control of, any Federal court in and for any district in this state, or in the custody of any depository, clerk or other officer of such court, or has been surrendered by such court or its officers to the United States Treasury, the circuit court of any county in which such Federal court sits shall have jurisdiction to ascertain whether an escheat has occurred, and to enter a judgment of escheat in favor of the state. This section does not authorize a judgment to require such

courts, officers, agents or depositories to pay or surrender funds to this state on a presumption of abandonment as provided in KRS 393.060 to 393.110.

393.180 (1618) PROCEEDINGS INSTITUTED BY COUNTY ATTORNEY ON RELATION OF COMMISSIONER.

Any legal proceeding to enforce KRS 393.020 to 393.050 and to recover any sum due the state thereunder shall be instituted, on the relation of the commissioner, by the county attorney of the county in which any such property is located. The petition and all necessary pleadings shall be sent to the commissioner for his signature and approval. The petition shall be accompanied by an affidavit of the county attorney, stating the facts on which it is based. For all other pleadings, there shall be a statement by the county attorney of the reason for the particular pleading.

393.190 (1618) ASSISTANT ATTORNEY-GENERAL TO AID COUNTY ATTORNEY.

On any action filed by a county attorney under the provisions of this chapter, the assistant Attorney-General provided for in KRS 15.140 shall offer assistance and suggestions to the county attorney in the preparation of the petition or any pleadings, and revise and correct them as he considers necessary, subject to the ultimate approval of the commissioner, when he is required to sign them.

393.200 (1618) COMPENSATION OF COUNTY ATTORNEY; COMMISSIONER MAY PERFORM HIS DUTIES.

If the county attorney performs all the duties imposed upon him by this chapter relating to enforcement of KRS 393.020 to 393.050 he shall be entitled to a fee of fifteen percent of any sum recovered in the proceeding, but shall be limited to five percent on intangible property recovered in excess of one thousand dollars. If the county attorney declines to perform the duties imposed upon him by this chapter, they may be performed by the commissioner, and the county attorney shall not be entitled to any fee. When he considers it to the best interest of the state, the com-

missioner may institute any action authorized by this chapter to be brought by the county attorney, or join the county attorney in the active prosecution of any such action. The county attorney shall be entitled to his fee in either instance if he does his duty.

Assistant Attorney-General assigned to Department of Revenue, KRS 15.140.

393.210 (1618) PROPERTY IN TWO OR MORE COUNTIES; COMPENSATION OF COUNTY ATTORNEYS.

If the property of a person coming within the purview of KRS 393.020 to 393.050 is located in two or more counties, all the property may be included in one action. The county attorneys of all counties in which such property is located may join in the prosecution of the proceeding. Their fees shall be determined by the amount of money derived from the property located within their respective counties when possible to determine that figure. Otherwise, the courts shall determine their fees by equitable apportionment in accordance with the value of the property located in their respective counties.

393.220 (1618) DISPOSITION OF TANGIBLE PROPERTY DURING PROCEEDING.

Pending the outcome of an action, the court may make such disposition of the land or tangible personal property involved as it considers best from the standpoints of use, rents, interest and profits. If the use of the property is given to the claimant by the court, he shall be held accountable for returns and profits arising from it if the state is successful in the proceeding.

393.230 (1619) PROCEEDING TO FORCE PAYMENT OF INTANGIBLE PROPERTY; TO ESTABLISH ACTUAL ABANDONMENT.

(1) If any person or the agent of any court refuses to pay or surrender intangible property to the department as provided in KRS 393.060 to 393.110, an equitable proceeding may be brought on the relation of the commissioner to force payment or surrender. All property subject to KRS 393.060 to 393.110 may be listed and included in a single action.

(2) If any intangible property is turned over to the department on presumption of abandonment, in accordance with KRS 393.060 to 393.120, the commissioner may at any subsequent time institute proceedings to establish conclusively that it was actually abandoned, or that the owner has died and there is no person entitled to it.

393.240 (1619) ACTIONS MAY BE JOINED; SHALL BE IN EQUITY.

(1) If any person has property coming within the purview of KRS 393.020 to 393.050, and also of KRS 393.060 to 393.110, the actions required to be brought by the county attorney and the commissioner may be joined, but joinder is not required, and if separate actions are brought, they shall not be considered as coming within the rule against splitting a cause of action. The county attorney is not charged with the duty of enforcing sections KRS 393.060 to 393.120, 393.150 or 393.160.

(2) The procedure for all actions under this chapter shall be filed as equity actions and follow the procedure provided by the Civil Code of Practice, unless otherwise provided in this chapter.

393.250 (1620) EXPENSES, HOW PAID; COUNTY ATTORNEY TO COLLECT JUDGMENTS, DEDUCT FEE.

(1) Any necessary expense required to be paid by the state in administering and enforcing this chapter shall be paid out of appropriations made to the department.

(2) The county attorney shall act as agent of the department for the collection of all judgments recovered in actions prosecuted by him under this chapter. He shall deduct the fee allowed him and promptly remit the remainder to the department with such information relating thereto as the department requires.

393.260 (1621) LIMITATION OF STATE'S ACTION.

Any action brought by the state under this chapter shall be brought within fifteen years from June 12, 1940 or from the time when the cause of action accrued, whichever is the later date.

393.270 (1622) PERSON UNDER DISABILITY, EXTENSION.

Any person under disability affected by this chapter shall have five years after the disability is removed in which to take any action or procedure or make any defense allowed to one sui juris.

393.280 (1622-1) EXAMINATION OF RECORDS; PROMULGATION OF RULES; DELEGATION OF COMMISSIONER'S AUTHORITY.

(1) The department, through its employees, may examine all records of any person where there is reason to believe that there has been or is a failure to report property that should be reported under this chapter.

(2) The commissioner may promulgate any reasonable and necessary rules for the enforcement of this chapter, and govern hearings held before him. He may delegate in writing to any regular employee of the department authority to perform any of the duties imposed on him by this chapter, except the promulgation of rules.

393.290 (1622-1) CIVIL ACTION TO ENFORCE PRODUCTION OF REPORTS, SURRENDER OF PROPERTY.

(1) The department may require the production of reports, or the surrender of property as provided in this chapter by civil action, including an action in the nature of a bill of discovery, in which case the defendant shall pay a penalty equal to ten percent of all amounts that he is ultimately required to surrender. This penalty shall not exceed five hundred dollars.

(2) Any person who in good faith contests the applicability of this chapter to him may be relieved of the threat of any penalty by posting a compliance bond in an amount and of surety sufficient to the court.

393.300 (1623-1) RESTRICTION ON ESCHEAT OF REAL PROPERTY HELD BY LENDING CORPORATION UNDER SUPERVISION.

No person shall institute proceedings to escheat real property the title to which was acquired by any lending

corporation in satisfaction of debts previously contracted in the course of its business, or that it purchases under a judgment for any such debt in its favor, if such lending corporation is under the supervision of the Division of Banking of this state, Comptroller of Currency of the United States or any other duly constituted supervising banking authority, state or Federal, without first obtaining the consent of the supervising authority having supervision over that corporation.

393.990 (1622-1) PENALTIES.

Any person who refuses to make any report as required by this chapter shall be fined not less than fifty dollars nor more than two hundred dollars, or imprisoned for not less than thirty days nor more than six months, or both.

**Acts of the General Assembly, 1940, Chap. 79 (H. B. 321),
P. 333.**

"An Act relating to all classes of property actually or presumptively subject to escheat; providing the terms upon which presumption of abandonment of property and presumption of the death of persons shall be determined; providing how and when said property may be escheated to the Commonwealth of Kentucky, providing for the reduction of all such property to cash, transferring the possession of same to the Treasurer of Kentucky; providing how any person who is legally entitled thereto may recover same from the Treasurer; providing that any person transferring property to the Commonwealth as required by this Act shall be relieved of liability to the owner thereof or reimbursed for any liability or damage incurred by complying with this Act; defining certain words; providing for reports and examination of records; providing for the administration and enforcement of this Act, and for an Assistant Attorney General as incident thereto; providing fines, penalties, and imprisonment for failure to comply with this Act; providing that if any provision of this Act shall be held unconstitutional that it is the Legislative intent that all other provisions thereof shall remain in force and effect; repealing sections 1610 to 1623, inclusive of Carroll's Kentucky Statutes, Baldwin's 1936 Revision; repealing all Acts and parts of Acts in conflict with this Act; repealing Chapter 168, Acts of the Regular Session of the 1938 General Assembly of the Commonwealth of Kentucky; and repealing, amending and re-enacting sections 1606, 1607, 1608, and 1609 of Carroll's Kentucky Statutes, Baldwin's 1936 Revision.

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"Sec. 1. That sections 1610 to 1623 inclusive of Carroll's Kentucky Statutes, 1936 edition, and Chapter 168, Acts of the Regular Session of the 1938 General Assembly be, and the same are hereby repealed.

"Sec. 2. (Ky. St. 1605a) Whenever used in this Act, unless the context requires otherwise, the word 'person' shall mean and include any individual, state and national bank, partnership, joint stock company, business, trust, association, corporation, or other form of business enterprise, including a receiver, trustee, or liquidating agent.

"Whenever used in this Act, unless the context requires otherwise, the word 'claim' shall mean to demand payment or surrender of property from the person whose duty it is to pay the claimant, or surrender to him the property involved.

"Sec. 3. That section 1606 of Carroll's Kentucky Statutes, 1936 edition, be repealed, amended, and re-enacted so that when amended and re-enacted it shall read as follows:

(1606) "That part of estates or property having a situs in this Commonwealth, not disposed of by will of persons who have died, or may hereafter die without heirs or distributees entitled to the same; or which have been or may hereafter be devised to any person, or any heir or distributee or devisee of such person or of the testator, who has not claimed the same or shall not claim the same within eight (8) years after such death, shall vest in the Commonwealth, subject to all legal and equitable demands on same. All such property shall be liquidated and the proceeds thereof, less costs, fees, and expenses incidental to all legal proceedings of such liquidation shall be paid to the Department of Revenue. Any estates or property except a perfect title to a corporeal hereditament, which estates or property have been abandoned by the owner thereof, shall also vest in the Commonwealth, subject to all legal and equitable demands on same. All such property shall be liquidated and the proceeds thereof, less costs, fees, and expenses incidental to all legal proceedings of such liquidation shall be paid to the Department of Revenue.

"Sec. 4. That section 1607 of Carroll's Kentucky Statutes, 1936 edition, be repealed, amended, and re-enacted so that when amended and re-enacted it shall read as follows:

(1607). "The personal representatives of persons, whose estates or a part of whose estates are not distributed by

will, and who died without heirs or distributees entitled to same, shall settle their accounts within one (1) year after qualifying as such and pay over to the Department of Revenue the proceeds of all personal estate, first deducting the proper legal liabilities of the estate.

“(1) If the whole personal estate cannot be settled and the accounts closed within one (1) year, the settlement as far as practicable, shall then be made and the proceeds paid over to the Department of Revenue, and the residue shall be so settled and paid over as soon thereafter as can be properly done.

“(2) The personal representative shall take possession of the real estate of such decedent not disposed of by his will, and rent out the same from year to year until it is otherwise legally disposed of, and pay the net proceeds to the Department of Revenue.

“(3) The personal representative shall also make out and transmit to the Department of Revenue a description of the quantity, quality, and estimated value of such real estate and its probable annual profits.

“Sec. 5. That section 1608 of Carroll's Kentucky Statutes, 1936 edition, be repealed, amended, and re-enacted, so that when amended and re-enacted it shall read as follows:

(1608) “If any devisee or his heirs, advisee or distributee, or any heir or distributee of a testator has failed or shall hereafter fail for eight (8) years to claim his legacy the personal representative of such testator or other person having the same in possession shall, after deducting the legal liabilities thereon, pay and deliver over such legacy, whether the same be real or personal estate, and the net profits thereof to the Department of Revenue.

“Sec. 6. That section 1609 of Carroll's Kentucky Statutes, 1936 edition, be repealed, amended, and re-enacted, so that when amended and re-enacted it shall be read as follows:

(1609) “When any person owning property or estates having a situs in this Commonwealth is not known to be living for seven (7) successive years, and neither said owner, his heirs, devisees, or distributees can be located or

proved to have been living for seven (7) successive years, such person shall be presumed to have died without heirs, devisees, or distributees, and both his real and personal estate shall be liquidated and the proceeds, less costs incident to the liquidation and any legal proceedings, and less the liabilities which have been properly claimed and approved against same, shall be paid to the Department of Revenue.

(1610) "Sec. 7. When the owner or owners (whether such ownerships be legal, beneficial, equitable, or otherwise) of deposits payable on demand in any bank or trust company (either state or national) within this Commonwealth, have not or shall not within ten (10) successive years next preceding the date as of which reports are required to be made by section 8 of this Act, (a) negotiated in writing with the bank or trust company in respect thereto, or (b) been credited with interest on the pass book or certificate of deposit on his or their request, or (c) had a transfer, disposition of interest, or other transaction noted of record in the books or records of such bank or trust company, or (d) increased or decreased the amount of the deposit, such deposit and the interest thereon shall be presumed abandoned.

"When the owner or owners (whether such ownerships be legal, beneficial, equitable, or otherwise) of deposits other than those payable on demand in any bank or trust company (either state or national) within this Commonwealth, have not or shall not within twenty-five (25) successive years next preceding the date as of which reports are required to be made by section 8 of this Act, (a) negotiated in writing with bank or trust company in respect thereto, or (b) been credited with interest on the passbook or certificate of deposit on his or their request, or (c) had a transfer, disposition of interest, or other transaction noted of record in the books or records of such bank or trust company, or (d) increased or decreased the amount of the deposit during said period, such deposits and the interest thereon shall be presumed abandoned.

"All deposits of money, stocks, bonds, or other credits of any kind whatsoever made to secure payment for services

rendered or to be rendered, or to guarantee the performance of services or duties, or to protect against damage or harm and the increments thereof, shall be presumed abandoned unless claimed by the person entitled thereto within ten (10) years after the occurrence of such event as would obligate the holder or depository to return the same or the equivalent thereof to the proper owner or claimant.

"All dividends, stocks, and bonds and the increments thereof, all monies and credits and the increments thereof, all claims for monies and credits and the increments thereof, and all intangible personal estate or property whatsoever and the increment thereof, held within this Commonwealth by any person for the benefit of another person shall be presumed abandoned unless claimed by the beneficiary or person entitled thereto within ten (10) years from the time the holder, trustee, debtor, or other responsible person became obligated to return the same or the equivalent thereof to the proper owner or claimant. If the increments or benefits payable on any instrument are not claimed within the time and manner prescribed in this paragraph, the instruments or evidence of the debt or obligation shall likewise be presumed abandoned.

"All estate or property paid into any court of this Commonwealth for distribution and the increments thereof shall be presumed abandoned if not claimed within five (5) years after the estate was so paid into court, or as soon after said (5) year period as all claims filed in connection therewith shall have been disallowed or settled by the court.

"None of the provisions of this Act shall apply to bonds of counties, cities, school districts, or other tax levying subdivisions of this Commonwealth.

(1611) "Sec. 8. It shall be the duty of all state and national banks, trust companies, or other persons, and courts of this Commonwealth or the agents thereof, whether holding estates or property as bailee, depository, debtor, trustee, executor, liquidator, administrator, distributor, receiver, or other capacity coming within the purview of section 7 of this Act, to report annually to the Department of Revenue as of July 1, all property held by them declared by this Act now to be presumed abandoned, and all property which shall hereafter become presumed abandoned under

the provisions of this Act. The report shall be filed in the offices of the Department of Revenue in Frankfort on or before September 1 of each year for the preceding July 1, and shall give the name of the owner, his last known address, the amount and kind of property, and such other information as the Department of Revenue may require for the administration of this Act. Such persons or court as may have made report of any estate or property presumed abandoned, as required in this Act, shall, within four (4) months after July 1, turn over to the Department of Revenue all property so reported; except, that if the person making such report, or any other person or persons are able to prove by competent evidence on hearing before the Commissioner of Revenue that the owner or person entitled to the property has subsequently within said four (4) months transacted business resulting in writing of record in the books of the person or court making the report, which shows the owner or person entitled to the estate or property has knowledge thereof and still claims his legal or equitable right thereto or has by other competent evidence clearly manifested such knowledge or claim, it shall not be the duty of the person or court making such report or in possession of such property to surrender it to the Department of Revenue.

(1612) "Sec. 9. Any intangible personal estate or property required by sections 7 and 8 of this Act to be liquidated so as to permit payment thereof to the Department of Revenue, shall be surrendered to the Department of Revenue and sold by the Department of Revenue at public sale at Frankfort, or in such other city in the Commonwealth as may in its judgment afford the most favorable market for the particular property involved, to the highest bidder; provided that it may decline the highest bid and reoffer the property for sale if it deems the price offered insufficient. Such sale shall be advertised at least one week before the date of the sale in a newspaper of general bona fide circulation in the county where said property was found or abandoned, and in the county where the sale is to be made, and the sale shall be held at the courthouse door.

(1613) "Sec. 10. Any person who shall transfer to the Department of Revenue, property to which the Commonwealth is entitled under the provisions of this Act, is hereby relieved of any liability to the owner of such property arising from such transfer; however, if any such person cannot be relieved of such liability by the provisions of this section, the Commonwealth shall reimburse such person for all liability to the owner of the property or estate or damage incurred by reason of compliance with the provisions of this Act.

(1614) "Sec. 11. Any person claiming an interest in estates or property paid or surrendered to the Commonwealth in accordance with the provisions of sections 3, 4, 5, or 6 of this Act, who was not actually served with notice and who did not appear, and whose claim was not considered during the action or at the proceedings which resulted in the payment of same to the Commonwealth, may within five (5) years after the judgment file his claim thereto with the Department of Revenue.

"Any person claiming an interest in estates or property paid or surrendered to the Commonwealth in accordance with sections 7, 8, or 9 of this Act, which was not subsequently adjudged under the procedure set out in section 16 of this Act to have been actually abandoned, or owned by a decedent who had no heir, distributee, devisee, or other person entitled under the laws of this Commonwealth relating to wills, descent and distribution, to take the legal or equitable title to such estate or property, may file his claim thereto at any time after same was paid to this Commonwealth.

"The claimant shall within fifteen (15) days after filing any claim permitted under this section publish notice of such claim in a newspaper of general bona fide circulation in the county in which the property was held before being transferred to the Commonwealth as herein provided. If there be no such newspaper, the claimant shall post such notice at the courthouse door and in three other conspicuous places in said county, and shall file proof of such publication or posted notice with the Department of Revenue. No such claim shall be allowed until fifteen (15) days after

proof of such notice is received by the Department of Revenue at its office in Frankfort.

(1615) "Sec. 12. It shall be the duty of the Commissioner of Revenue to consider any claim and/or defense permitted to be filed before it and to hear evidence in respect thereto. If the claimant establishes his claim, the Commissioner of Revenue shall, when the time for appeal or further legal procedure herein provided has expired, authorize payment to him of a sum equal to the same amount which was paid into the Treasury in compliance with this Act. The decision shall be in writing and shall state the substance of the evidence heard by the Commissioner of Revenue if a transcript thereof be not kept and such decision shall be a matter of public record.

"Any person, petitioner, or claimant dissatisfied with the decision of the Commissioner of Revenue may within sixty (60) days, appeal from such decision to the Franklin Circuit Court or file an action in said court to vacate such decision. In either event the proceedings shall be de novo, and no transcript of the record before the Commissioner of Revenue shall be required to be kept unless requested by the claimant. In any such proceeding before the Franklin Circuit Court, the Commissioner of Revenue shall be made a party defendant, and all other persons required by law to be made parties defendant or plaintiff and served with actual or constructive notice in rem or quasi in rem actions shall be so treated. Any party adversely affected by the decision of the Franklin Circuit Court may appeal to the Kentucky Court of Appeals in the manner now generally provided by law, but such appeal must be commenced within sixty (60) days after the judgment. However, the Commonwealth shall in no event be required to make a superseas bond. The provisions of this section which relate to the decision of the Commissioner of Revenue and appeals therefrom shall also apply to a decision of the Commissioner rendered under authority of section 8 of this Act requiring payment to the Department of Revenue over the protest of the holder or claimant of the property.

(1616) "Sec. 13. Whenever any estate or property which may be escheated under the provisions of this Act by

reason of actual abandonment, or death and for presumption of death of the owner without an heir, distributee, devisee or other person entitled to take the legal or equitable title to such estate or property under the laws of this Commonwealth relating to wills, or descent and distribution, has or shall hereafter be deposited with, or in the custody of, or under the control of any court of the United States in and for any district within this Commonwealth, or in the custody of any depository, clerk or other officer of such court, or shall have been surrendered by such court or its officers to the United States Treasury, the circuit court of this Commonwealth in any county in which such court of the United States sits, shall have jurisdiction to ascertain whether an escheat has occurred, and to enter a judgment of escheat in favor of the Commonwealth. Provided, however, this section shall not be construed as authorizing a judgment to require such courts, officers, agents, or depositories to pay or surrender such funds to the Commonwealth on a presumption of abandonment as provided in sections 7 and 8 of this Act.

(1617). "Sec. 14. To aid in the enforcement and administration of the provisions of this Act, the Attorney General shall, with the approval of the Governor, appoint an additional Assistant Attorney General, having at least the qualifications of the Sixth Assistant Attorney General, and assign him to the Department of Revenue. It shall be the special duty of such Assistant Attorney General to represent the Commonwealth at the hearings required by this Act to be held before the Commissioner of Revenue to consider claims filed pursuant to section 11 of this Act; to advise the Department of Revenue, county attorneys, and all other inquiries, with respect to questions arising under the provisions of this Act; to aid in the prosecution of all other actions or proceedings authorized by this Act when so directed by the Commissioner of Revenue or the Attorney General; and to perform such other duties as are imposed on him by any provisions of this Act. Provided, however, his opinions shall be subject to the approval of the Attorney General in the same manner as is such work of other Assistant Attorney General now established by law,

and he shall also have the other ordinary powers and duties of an Assistant Attorney General.

"He shall receive a salary not exceeding four thousand dollars (\$4,000) a year, to be fixed by the Attorney General and the Commissioner of Revenue as provided by law, which shall be paid on authorization of the Commissioner of Revenue in the same manner as employees of the Department of Revenue are generally paid.

(1618) "Sec. 15. All legal proceedings to enforce sections 3, 4, 5, and 6 of this Act shall be instituted on the relations of the Commissioner of Revenue.

"It shall be the duty of the county attorney of a county in which any estate or property is located, coming within the purview of sections 3, 4, 5, or 6 of this Act, to institute such legal proceedings as are necessary to enforce the provisions of said sections and to recover such sums as are due the Commonwealth thereunder. The petition and all pleadings necessary to be filed in such proceedings shall be on the relation of the Commissioner of Revenue and shall be sent to the Commissioner of Revenue for his signature and approval. The petition shall be accompanied by an affidavit of the county attorney, stating the facts on which it is based. For all other pleadings, there shall be a statement by the county attorney of the reason for the particular pleading.

"On any action or proceeding filed by a county attorney under the provisions of this Act, it shall be the duty of the Assistant Attorney General, provided for in section 14 of this Act, to offer assistance and suggestions to the county attorney in the preparation of the petition or any pleadings, and to revise and correct same as he may deem necessary, subject to the ultimate approval of the Commissioner of Revenue, when he is required to sign same.

"If the estate or property of a person coming within the purview of sections 3, 4, 5, or 6 of this Act is located in two or more counties, all such property may be included in one action or proceeding; provided, however, that the county attorneys of all counties in which such property is located may join in the prosecution of the action or proceeding, and their fees shall be determined by the amount of money

derived from the property located within their respective counties when possible to determine such figure; otherwise, the courts shall determine their fees by equitable apportionment in accordance with the value of the property which is located in their respective counties.

"If the county attorney performs all the duties imposed upon him by this Act relating to enforcement of the provisions of sections 3, 4, 5, or 6, he shall be entitled to a fee of fifteen per cent (15%) of any sum recovered in such proceeding, except that the county attorney's fee shall be limited to five per cent (5%) on intangible property recovered in excess of one thousand dollars (\$1,000).

"In the event that a county attorney declines to perform the duties imposed upon him by this Act, they may be performed by the Commissioner of Revenue and the county attorney shall not be entitled to any fee. The Commissioner may, when he deems it to the best interest of the Commonwealth, institute any action authorized by this Act to be brought by the county attorney, or join the county attorney in the active prosecution of any such action. The county attorney shall be entitled to his fee in either instance if he does his duty.

"Pending the outcome of an action or court proceeding, the court may make such disposition of the land or tangible personal property involved as may seem best from the standpoints of use, rents, interest, and profits. In the event the use of the property is given to the claimant by the court, such claimant shall be held accountable for returns and profits arising from such use, if the Commonwealth be successful in such proceeding.

(1619) "Sec. 16. In the event any person refuses to pay or surrender voluntarily intangible estate or property to the Department of Revenue, as provided in sections 7 or 8 of this Act, or if the agent of any court refuses so to do, a proceeding may be brought on the relation of the Commissioner of Revenue as an equity action in a court of competent jurisdiction to force such payment or surrender of property, and all property subject to said sections 7 and 8 may be listed and included in a single action.

"If intangible estates or property are turned over to the Department of Revenue on presumption of abandon-

ment, in accordance with sections 7, 8, or 9 of this Act, the Commissioner of Revenue may at any subsequent time institute proceedings in a court of competent jurisdiction to establish conclusively that such estate or property was actually abandoned, or that the owner thereof is dead and there are no heirs, devisees, distributees, or any other persons entitled to succeed to the title of same.

"In the event a particular person or persons may have property coming within the purview of sections 3, 4, 5, or 6 of this Act, and also sections 7 or 8 of this Act, the actions herein required to be brought by the county attorney and the Commissioner of Revenue may be joined, but joinder is not required, and if separate actions shall be brought, they shall not be considered as coming within the rule against splitting a cause of action. The county attorney shall not be charged with the duty of enforcing sections 7, 8, 9 and 12 of this Act.

"The procedure of any and all actions or proceedings permitted or necessary under this Act to be filed in a court of competent jurisdiction shall be the same as that now provided in Carroll's Kentucky Civil Code of Practice, unless provided differently herein, except that all such actions or proceedings shall be filed as equity actions.

(1620) "Sec. 17. All money received by the Department of Revenue under the provisions of this Act shall be deposited with the State Treasury and credited to the account of the General Expenditure Fund; provided, however, that ten per cent (10%) of such sum so received during the fiscal year beginning July 1, 1940, and ten per cent (10%) of such sum so received during the fiscal year beginning July 1, 1941, shall be added to and made a part of the appropriation available to the Department of Revenue for the respective fiscal years. After June 30, 1942, the legislature shall make provision for the administration of this Act in the regular budgetary appropriation made for the Department. All the expense necessary and required to be paid by the Commonwealth in administering and enforcing this Act shall be paid, out of the funds available to the Department of Revenue, and such expenses shall be paid in the same manner as other claims upon the Commonwealth are paid.

"The county attorney shall act as agent of the Department of Revenue for the collection of all judgments recovered in actions prosecuted by him under the provisions of this Act and he shall deduct the fee allowed him for his services performed pursuant to this Act, and promptly remit such collections to the Department of Revenue, with such information relating thereto as the Department may require.

(1621) "Sec. 18. Any action permitted by this Act to be brought by the Commonwealth must be brought within fifteen (15) years from the effective date of this Act or from the time when the cause of action accrued, whichever is the later date.

(1622) "Sec. 19. Any person under disability affected by this Act shall have five (5) years after the disability is removed in which to take any action or procedure or make any defense allowed to one sui juris.

(1622-1) "Sec. 30. The Department of Revenue, through its employees, is also authorized to examine all records of state and national banks or trust companies, corporations, companies, partnerships, agencies, and persons where there is reason to believe that there has been or is a failure to report property which should be reported under the provisions of this Act.

"The Commissioner of Revenue shall have authority to promulgate such reasonable rules and regulations as are necessary for the enforcement of this Act, and to govern hearings provided in this Act to be held before him. Provided, however, he may delegate in writing to any regular employee of the Department of Revenue authority to perform any of the duties imposed on him by this Act excepting the promulgation of rules and regulations.

"Any person, or representative thereof refusing to make any report as required by this Act, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty dollars (\$50) or more than two hundred dollars (\$200), or imprisoned not less than thirty (30) days or more than six (6) months, or both so fined and imprisoned. The Department of Revenue shall also have authority, as herein provided, to require such reports, or the surrender of

such property, by civil action, including an action in the nature of a bill of discovery, in which case such person shall be required to pay a penalty equal to ten per cent (10%) of all amounts which he may ultimately be required to surrender, but in no event shall said penalty exceed five hundred dollars (\$500).

"Any person bona fide contesting the applicability of this Act to him may be relieved of the threat of any fine or penalty by posting a compliance bond in an amount and of surety sufficient to the court.

"Sec. 21. All Acts and parts of Acts in conflict with this Act are, to the extent of such conflict, hereby repealed.

"Sec. 22. It is the intent and purpose of the General Assembly of this Commonwealth of Kentucky to enact each and every provision of this Act separately, so that in the event the courts for any reason should hold any provision thereof void, or the application of any provision thereof void, then all other provisions or the application of any or all other provisions shall be deemed to remain in full force and effect; and it is hereby expressly declared that the General Assembly would have enacted any part or provision of this Act, irrespective of any other part or provision thereof.

"Approved March 1, 1940 by Governor Johnson."

Sec. 8, 1942 Amendment.

"It shall be the duty of all state and national banks, trust companies, or other persons, and courts of this Commonwealth or the agents thereof, whether holding estates or property as bailee, depository, debtor, trustee, executor, liquidator, administrator, distributor, receiver, or in any other capacity coming within the purview of section 7 of this Act, to report annually to the Department as of July 1, all property held by them declared by this Act to be presumed abandoned. The report shall be filed in the offices of the Department on or before September 1 of each year for the preceding July 1, and shall give the name of the owner, his last known address, the amount and kind of property, and such other information as the Department may require for the administration of this Act.

"The report shall be made in duplicate; the original shall be retained by the Department, and the copy shall be mailed to the sheriff of the county where the property is located or held. It shall be the duty of the sheriff to post said copy on the court house door or the court house bulletin board. The sheriff shall immediately certify in writing to the Department the date when said copy was posted. Said copy must be posted on or before October 1 of the year when it is made, and shall be constructive notice to all interested parties and shall be in addition to any other notice provided by statute or existing as a matter of law.

"Any person who has made a report of any estate or property presumed abandoned, as required by this Act, shall, between November 1 and November 15 of each year, turn over to the Department all property so reported; but if the person making the report or the owner of the property shall certify to the Department by sworn statement that any or all of the statutory conditions necessary to create a presumption of abandonment no longer exist or never did exist, or shall certify the existence of any fact or circumstance which has a substantial tendency to rebut such presumption, then, the person reporting or holding the property shall not be required to turn the property over to the Department except on order of court. No person shall be required to

surrender any property on a presumption of abandonment to the Department if the period of time provided by any statute of limitation applicable to the owner's rights as against the holder has expired unless the court orders him to do so. If a person files an action in court claiming any property which has been reported under the provisions of this Act, the person reporting or holding such property shall be under no duty while any such action is pending to turn the property over to the Department, but shall have the duty of notifying the Department of the pendency of such action.

"The person reporting or holding the property or any claimant thereof shall always have the right to a judicial determination of his rights under this Act and nothing therein shall be construed otherwise; and the Commonwealth may institute an action to recover such property as is presumed abandoned whether it has been reported or not and may include in one petition all such property within the jurisdiction of the court in which the action is brought provided the property of different persons is set out in separate paragraphs."

COURT OF APPEALS OF KENTUCKY

June 15, 1943

ANDERSON NATIONAL BANK, ETC., *Appellant*,

vs.

H. CLYDE REEVES, INDIVIDUALLY, ETC., *Appellee*.

Appeal from Franklin Circuit Court

Hon. W. B. Ardery, Judge

Opinion by Chief Justice Fulton—Affirming.

This is the second appeal of this case. The opinion on the first appeal, reported in 293 Ky. 735, 170 S. W. (2d) 350, upheld the validity of the principal sections of Chapter 79 of the Acts of 1940 as amended by Chapter 156 of the Acts of 1942 (KRS 393.010 et seq.) and affirmed the judgment of the lower court on the appeal but reversed it on the cross-appeal.

On the return of the case to the lower court judgment was entered in conformity with this opinion. This appeal is from that judgment.

We are bound by the opinion on the first appeal, whether it be right or wrong, under our familiar law of the case rule. We have considered the contentions 1) that the Act in question conflicts with the National Banking Act and 2) that it is violative of the due process clause of the 14th Amendment to the Federal Constitution and find the contentions without merit.

Since the judgment is in conformity with the former opinion it is affirmed.

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Attorneys for Appellee:HUBERT MEREDITH, *Attorney General*, Frankfort, Kentucky.EARL S. WILSON, *Asst. Atty. Gen.*, Frankfort, Kentucky.A. E. FUNK, *Asst. Atty. Gen.*, Frankfort, Kentucky.

COURT OF APPEALS OF KENTUCKY

December 18, 1942

ANDERSON NATIONAL BANK, ET AL., *Appellant*,
vs.

H. CLYDE REEVES, individually and as Commissioner of
Revenue, *Appellee*.

Appeal from Franklin Circuit Court
Hon. Wm. B. Ardery, Judge

**Opinion by Judge Fulton—Affirming on the Original Ap-
peal and Reversing on the Cross-Appeal.**

This appeal brings in question the correctness of a judgment holding valid certain parts of Chap. 79 of the Acts of 1940 (K.R.S. 393.010 et seq.) as amended by Chap. 156 of the Acts of 1942, dealing with escheats and with the disposition of certain classes of property declared to be presumed abandoned. By the cross-appeal it is sought to reverse the judgment in so far as it adjudged certain portions of the same Acts invalid.

By sections 3 to 6 of the Act inclusive (K.R.S. sections 393.020, 393.030, 393.040 and 393.050) certain classes of property are made subject to escheat and it is made the duty of the Commissioner of Revenue to institute proceedings to vest title to such property in the Commonwealth, the procedure to be in accordance with the Civil Code. Where title to such property is vested in the Commonwealth pursuant to such proceedings, any person claiming an interest therein, and who was not actually served with notice and did not appear in the proceedings, may within five years after the judgment file his claim with the Department of Revenue. Appropriate procedure is provided for the prosecution of such claims and right of appeal is given to the Franklin Circuit Court and to this court. These portions of the Act are not in controversy although it is suggested by appellants that the entire Act should be declared invalid.

They are mentioned, however, for the purpose of giving a general idea as to the scope of the Act.

So far as material to this controversy section 7 of the Act (K.R.S. 393.060 and 393.070) provides in substance:

(1) That where the owner of bank deposits payable on demand has not for ten successive years next preceding the date for making reports as required by the Act (a) negotiated in writing with the bank or trust company concerning it, or (b) been credited with interest on the pass book or certificate of deposit on his request, or (c) had a transfer, distribution of interest, or other transaction noted of record in the books or records of the bank or trust company, or (d) increased or decreased the amount of deposit, such deposits shall be presumed abandoned.

(2) The same presumption of abandonment arises with respect to deposits not payable on demand except that the period of time is twenty-five years instead of ten.

Section 8 (K.R.S. 393.110) provides in substance that all persons holding property declared to be presumed abandoned must report same to the Department of Revenue annually as of July 1, the report being due on or before September 1 of each year. A copy of the report is required to be posted on the courthouse door or bulletin board on or before October 1 and it is provided that such publication "shall be constructive notice to all interested parties and shall be in addition to any other notice provided by statute or existing as a matter of law." The person reporting the property is required to turn it over to the Department of Revenue between November 1 and November 15 except that "if the person making the report or the owner of the property shall certify to the Department by sworn statement that any or all of the statutory conditions necessary to create a presumption of abandonment no longer exists or never did exist or shall certify the existence of any fact or circumstance which has a substantial tendency to rebut such presumption, then the person reporting or holding the property shall not be required to turn the property over to the Department except in order of court The person reporting or holding the property or any claimant thereof shall always have

the right to judicial determination of his rights under this Act and nothing therein shall be construed otherwise; and the Commonwealth may institute an action to recover such property as is presumed abandoned whether it has been reported or not"

Section 17 (K.R.S. 393.250) provides that all monies received by the Department of Revenue under the provisions of the Act must be deposited with the State Treasurer and credited to the account of the General Expenditure Fund.

Section 11 (K.R.S. 393.140) provides that any person claiming an interest in any property turned over to the state on the ground that it was presumed abandoned (provided it was not subsequently adjudged to have been actually abandoned) may claim it "at any time after same was paid to this Commonwealth"; and, even where actual abandonment was adjudged subsequent to payment to the state, any person claiming an interest, who was not actually served with notice and who did not appear, and whose claim was not considered during the proceedings, may within five years after the judgment file his claim with the Department.

Section 12 (K.R.S. 303.140) provides that if a claimant establishes his right to property presumed abandoned the Commissioner of Revenue must authorize payment to him of a sum "equal to the same amount which was paid in to the State Treasury in compliance with this Act".

The claimant is required to publish notice of his claim, within fifteen days after filing it, in a newspaper in the county in which the property was held before being transferred to the Commonwealth.

Section 10 (K.R.S. 393.130) provides: "Any person who transfers to the department property to which the state is entitled under this chapter shall be relieved of any liability to the owner arising from that transfer. The state shall reimburse any person who cannot be relieved of such liability by this section for all liability to the owner of the property or estate or damage incurred by reason of compliance with this chapter."

Section 16 (K. R. S. 393.230) provides that if any one refuses to pay or surrender property presumed abandoned to the Department as required by the Act, an equitable proceeding may be brought on relation of the Commissioner to force payment or surrender. It is further provided that if property is turned over to the Department on presumption of abandonment the Commissioner may at any subsequent time institute proceedings to establish conclusively that it was *actually* abandoned, or that the owner has died and there is no person entitled to it. It is also provided in this section that all actions mentioned under the Act shall be filed as equity actions and follow the procedure provided by the Civil Code of Practice, unless otherwise provided.

This action was filed under the Declaratory Judgment Act by the Anderson National Bank, suing on behalf of itself and all others similarly situated and on behalf of depositors in banks, to test the validity of the Act and an injunction was sought to prevent the appellees from enforcing it—the appellees do not question the right of appellants to challenge the validity of the Act in the representative status assumed.

The trial court adjudged that the part of the Act requiring a voluntary delivery of the property to the state was unconstitutional because of the absence of provision for adequate notice to the owners of the property. Accordingly, the appellees were enjoined from insisting on or accepting a delivery of property presumed abandoned without first filing a suit and procuring a judgment for delivery thereof. It was adjudged that the Act was valid in so far as it required reports of property presumed abandoned and in so far as it authorized the filing of actions to compel the surrender of property declared to be presumed abandoned. Accordingly, the trial court declined to enjoin appellees from requiring reports of property presumed abandoned and also declined to enjoin appellees from filing suits to recover property presumed abandoned, whether reported or not.

Appellants question the correctness of the judgment in holding the indicated portions of the Act valid and the appellees, by cross appeal, seek a reversal of the judgment

in so far as it holds any part of the Act unconstitutional or enjoins enforcement thereof:

Appellants advance the propositions 1) that the provisions of the Act requiring delivery to the State of deposits declared to be presumed abandoned constitute, in effect, an attempted escheat of such deposits, which is invalid because of the absence of notice and judicial determination, 2) that even if valid as to deposits made subsequent to the Act such provisions are ineffective as to prior deposits because, when so applied, such provisions impair the obligation of the contract of deposit, and 3) that in any event such provisions, even though valid as to state banks, are invalid as to national banks. These propositions will be considered in the order named.

Appellants' brief contains an elaborate and scholarly treatise on the origin, history and purposes of prior escheat laws of this state as a basis for their argument that the Act is unconstitutional in so far as it requires a delivery to the state of deposits declared to be presumed abandoned without a judicial determination to that effect made after adequate notice. And, were we dealing with an out and out escheat act, their argument would be most persuasive—we would unhesitatingly say that there can be no escheat except pursuant to judicial determination made after legal notice.

But such is not the case, notwithstanding appellants' vehement insistence to the contrary and notwithstanding the fact that the title of the Act recites that it relates to property actually or presumptively subject to escheat. Certain parts of the Act, as indicated above, do relate to out and out escheat but before title can become vested in the state judicial determination is necessary and such determination must be made after adequate notice since the proceedings are required to be according to the Civil Code.

But the portions of the Act dealing with dormant bank deposits do not provide for a seizure of the deposits and vesting of title or ownership in the state but merely for a transfer of property which may later be adjudged to be subject to escheat, and these provisions are for the benefit and protection of both the depositors and the state. As said by the Supreme Court in *Provident Institution for Savings*

v. Malone, 221 U. S. 660, 31 S. Ct. 661, 55 L. Ed. 899, 31 L. R. S. (N. S.) 1129, in discussing a somewhat similar statute, "the statute proceeds on the general principle that corporations may become involved, or may be dissolved; or that, after long lapses of time, changes may occur which would require someone to look after the rights of the depositor. The statute deals with accounts of an absent owner, who has so long failed to exercise any act or ownership as to raise the presumption that he has abandoned his property. And if abandoned, it should be preserved until he or his representative appear to claim it; or, failing that, until it should be escheated to the state. The right and power so to legislate is undoubted."

The good faith of the Legislature cannot be questioned and it is to be assumed that the Act was for the protection of the deposits as well as for the benefit of the state. That this is a justifiable assumption is clearly revealed in the provision giving the depositor (and this, of course, includes his legal representatives) the right, without limit of time, to make a claim and receive a return of the deposit provided there has not been a judicial determination of actual abandonment—and even after such judicial determination five years is given for the same purpose to any person who was not actually served with notice and did not appear in the proceedings.

~~In this respect both~~ the rights of the depositor and the bank are fully protected by giving to the depositor a right of action against the state, which is conclusively presumed always to be able to pay, and by the provision relieving the bank of liability to the depositor upon compliance with the Act, fortified by the further provision for reimbursement to the bank by the state for any liability incurred by reason of compliance with the Act. The mere taking away of the depositor's right of action against the bank constitutes no substantial deprivation of property when, in lieu thereof, he is afforded an action against the Commonwealth, the most perfect of all protection.

Nor does the requirement that the owner making claim must publish notice of his claim in a newspaper within fifteen days after filing it impose such a burden as to constitute a substantial deprivation. This is a reasonable re-

quirement and is for the benefit of depositors whose deposits have been turned over to the state. Publicity is thus given to such claims in order that the true owners may be put on notice if a false claim is made.

It is our conclusion that the controversial portions of the Act are reasonable (as to the time provided as well as to the procedure) and that they would not constitute a deprivation of property without due process of law in violation of the Constitution of the United States even in the absence of the provision requiring notice to be posted at the courthouse door. Accordingly, it becomes unnecessary to discuss the sufficiency of such notice.

The conclusion we have reached is fully supported by *Comth. of Pennsylvania v. Dollar Savings Bank*, 259 Pa. 138, 102 Atl. 569, 1 A. L. R. 1048; *State v. Security Sav. Bank*, — Calif. App. —, 154 Pa. 1070; *Provident Institution for Savings v. Malone*, supra, and *Brookline Borough Gas Co. v. Bennett*, 227 N. Y. S. 203. The latter case upheld a similar act dealing with consumer deposits with utility companies (a class of property within the purview of the presumptive abandonment provision of the act in question), but the legal questions involved were identical with ones confronting us here.

It is the contention of appellants that even though the Act be held valid it can apply only to deposits made after its effective date since its application to deposits made prior thereto would result in impairment of the contract between the depositor and the bank in violation of section 19 of the Constitution of Kentucky which prohibits the enactment of any law impairing the obligation of contracts. It is not argued that such application of the Act would result in violation of the contract clause of the Federal Constitution since this question was laid to rest by the Supreme Court in *Provident Institution for Savings v. Malone*, supra and *Security Sav. Bank v. Calif.*, 263 U. S. 282, 68 L. Ed. 306, wherein it was held that such statutes are not violative of the contract clause. These decisions are binding on us as to the federal question but not on the question of application of the Constitution of this state. *Glenn et al v. Field Packing Co.*, 290 U. S. 177.

In support of their contention appellant rely on *Bank of Louisville v. Board of Trustees of Public Schools*, 83 Ky. 219, 5 S. W. 735 and *Louisville School Board v. Bank of Kentucky*, 86 Ky. 150, 5 S. W. 739. In each of these cases the statutes in question attempted to vest in the school board title to bank deposits of persons who were absent from the state for eight years and who had not exercised any control over the deposits during that time. It was provided that the school board should be liable to the owner of the deposit, if he should later claim it. *but that no such liability should attach to the state.* In each case it was held that the deposit created a contract between the depositor and the bank by which the latter acquired the right to retain, use and control the money until it was returned to the depositor on his demand and that the statutes were void because they impaired the obligation of the contract from the standpoint of both the bank and the depositor.

A careful analysis of those opinions, reveals, however, that the underlying basis of the court's conclusion was the absence of perfect protection to the depositor and the bank. The opinion in the former case, on which the latter is based, is threaded through with comments on the failure of the statute to give the depositor, in lieu of his right of action against the bank, the substantial remedy of looking to the state for reimbursement and on its failure to give the bank any substantial remedy since it was left with no remedy except that of looking to the school board for reimbursement in the event it was compelled to account for the deposits. It is doubtful, to say the least, that the court would have reached the conclusion it did had the statute afforded to both a depositor and the bank the same perfect protection as that afforded by the Act here involved.

In any event, we think the correct conclusion was reached by the Supreme Court in the two cases referred to. It seems so clear as to require little discussion that there is no substantial impairment of the contract from the depositor's standpoint since his deposit is returnable to him by the state at any time he files a claim therefor. The argument as to impairment of the contract from the bank's standpoint was effectively answered by the Supreme Court in *Security Savings Bank v. Calif.*, supra, in these words: "The contract

of deposit does not give the banks a tontine right to retain the money in the event that it is not called for by the depositor. It gives the bank merely the right to use the depositor's money until called for by him or some other person duly authorized. If the deposit is turned over to the state, in obedience to a valid law, the obligation of the bank to the depositor is discharged."

It is our conclusion that the parts of the Act requiring a delivery of deposits ~~declared to be presumed abandoned~~ to the Department of Revenue are valid in their application to deposits made both prior and subsequent to the effective date of the Act.

There is little appeal in the insistence of appellants that if the strict letter of the decisions in *Bank of Louisville v. Board of Trustees of Public Schools and Louisville School Board v. Bank of Kentucky*, supra, is not followed our decision should be made prospective in accord with the policy adopted in *Payne v. City of Covington*, 276 Ky. 380, 123 S. W. (2d) 1045, of affording protection to those who have acted in reliance on opinions of this court and whose rights might be adversely affected by a change of decision, since, as indicated above, no substantial impairment of any right of either depositors or banks is effected by the Act.

The question of validity of the Act as applied to national banks must be approached in the light of the limitations applicable to state legislation affecting such institutions. National banks are amenable to state laws as are other institutions if such laws do not interfere with their functions in such manner as to conflict with the general objects and purposes of the National Banking Act. *First National Bank of Elizabethtown v. Com.*, 187 Ky. 151, 219 S. W. 175; *McClellan v. Chipman*, 164 U. S. 347, 41 L. Ed. 461; *First National Bank of San Jose v. Calif.*, 262 U. S. 366, 67 L. Ed. 1030. The burden placed on national banks of making the report of such deposits as the Act declares to be presumed abandoned is not an unwarranted interference. *Waite v. Dowley*, 94 U. S. 527, 24 L. Ed. 181. But, as said in *First National Bank of San Jose v. Calif.*, supra, "any attempt by a state to define their duties or control the conduct of their affairs is void whenever it conflicts with the laws of

the United States or frustrates the purposes of the national legislation or impairs the efficiency of the bank to discharge the duties for which it was created. Davis, *Elmira Sav. Bank*, 161 U. S. 275, 40 L. Ed. 700, 16 Sup. Ct. Rep. 502."

Appellants insist that the case just quoted from is conclusive as to the invalidity of the Act in its application to national banks. In that case was involved the validity of California statutes as so applied. The statutes declared that deposits in bank to the credit of depositors who for more than twenty years had not made a deposit or withdrawn any part of the deposit and where neither the depositor nor any claimant had filed any notice with the bank showing his present resident, should *escheat* to the state. The court, in commenting on the opinion of the Supreme Court of California affirming a judgment directing the payment of such deposits to the state, pointed out that the California court had declined to express an opinion as to whether the judgment operated as a present escheat of the rights of the depositor or whether the depositor still had the right to prosecute an action to obtain payment of the deposit from the state. Therefore, in discussing the case, the Supreme Court treated the California statutes as statutes of escheat or confiscation and held them void as being a regulation of national banks to such an extent as to tend to frustrate the purposes and objects of national legislation with respect to such banks. This was the reason the California statutes were held to be invalid as to national banks and not, as suggested by appellees, the fact that the statutes impaired the obligation of the contract of deposit. Analysis of the opinion reveals, however, that the only undue interference of the statutes with national banks was embodied in one sentence of the opinion as follows: "The success of almost all commercial banks depends upon their ability to obtain loans from depositors, and these might well hesitate to subject their funds to possible confiscation." Thus it seems that the California statutes were held invalid as to national banks because they were deemed by the court to be *escheat* statutes confiscating the deposits solely by reason of *dormancy*. The comment of the court

on the failure of the California court to express an opinion on the right of the depositor to secure a return of the deposit is significant. Thus, while this case unquestionably decided that the California statutes were invalid as to national banks, and while this decision was reaffirmed as to the particular California statutes in the later case of *Security Sav. Bank v. California*, supra, we do not feel that it is controlling as to the act in controversy since the Act differs from the California statutes in that no escheat is declared by reason of mere dormancy—The Act is one pursuant to which more custody, as distinguished from title, is vested in the state by reason of dormancy and is not one of confiscation having the tendency to cause depositors to hesitate to make deposits in national banks. And, since the confiscatory feature, which the Supreme Court had in mind as being the feature of the California statutes which tended to bring about an undue interference with national banks, is absent from the present Act, it does not appear to us that the case is controlling of the question now presented.

It is true that the Supreme Court of Tennessee in *American National Bank of Nashville v. Clarke*, Supt. of Banks, 175 Tenn. 480, 135 S. W. (2d) 935 and the United States Circuit Court of Appeals for the Sixth Circuit in *Star, Atty. Gen. v. O'Conner, Comptroller, et al*, 118 F. (2d) 548, relying on the authority of the case under discussion, held somewhat similar statutes of Tennessee and Michigan invalid as to national banks but it seems to us that those cases fail to give full consideration to the fact that the Supreme Court pointed out that the undue interference of the California statutes with national banks was brought about by the confiscatory nature of the statutes in providing out and out escheat by reason of mere dormancy. It is significant, though, that the opinion in the Sixth Circuit case did touch lightly on this aspect of the *San Jose Bank* case as is revealed by the remark that "the Michigan statutes resemble the California Act in being closer akin to illegitimate laws of forfeiture than to legitimate laws of escheat."

Since the act in controversy does not provide for an escheat of deposits by reason of mere dormancy, as did the California statutes, (title being vested in the state only

after judicial determination of *actual* abandonment), and since the depositor may at any time before actual abandonment is adjudged (and give years thereafter if he was not served with actual notice) secure a return of his deposit from the state, it is our opinion that the Act has no tendency to cause depositors to hesitate on account of apprehended fear of confiscation to make deposits in national banks. This being true, there is no unwarranted interference with such banks and no frustration of the purposes of national legislation concerning them such as to render the Act invalid as to them.

The judgment is affirmed on the original appeal and reversed on the cross appeal with directions to enter a judgment in conformity with this opinion. An order having been entered in this court suspending the operation of the Act during the pendency of the appeal, the circuit court will, on return of the case to that court, fix a date for compliance with the Act, giving a reasonable time for that purpose.

Whole court sitting except Judge Rees.

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Supreme Court of the United States

October Term, 1943.

ANDERSON NATIONAL BANK,

Appellant,

versus

H. CLYDE REEVES, Commissioner of Revenue,
et al.,

Appellees.

Appeal from the Court of Appeals of the State of Kentucky.

BRIEF IN BEHALF OF ANDERSON NATIONAL BANK

I. A State Statute is void as interfering with a Federal Instrumentality where it compels National Banks,

(1) To pay over to the State all National Bank deposits which the Statute defines "shall be presumed abandoned";

(2) To publish as a public record the names, addresses, and amounts of deposits, of all National Bank depositors where such deposits fall within the Statute's definition of deposits that "shall be presumed abandoned."

II. The Statute deprives both State and National Banks of their property without "due process of law."

III. This Court should *not* overrule *First Nat'l Bank of California*, 262 U. S. 366.

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FIRST POINT: The Kentucky Court of Appeals carefully construed the "Escheat Act."

1. It held that those provisions applicable to National Banks (a) did not declare an escheat at all; but (b) merely transferred property [i. e., such deposits as the Act declared should be "presumed abandoned"] from the "custody" of the National Banks; and vested the custody of such deposits [not the title] in the State.

2. That construction of the Escheat Act is binding upon this Court. 11

Anderson National Bank v. Reeves, 295 Ky. 735.
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SECOND POINT: K.R.S. §393.110 (as so construed) is void because:

1. It interferes with the custody, duties, and conduct of *National Banks*; and it regulates and frustrates the national purposes for which *National Banks* were created.

2. It trespasses upon the exclusive field of Federal Instrumentalities; which trespass, if sustained here, opens the door for unlimited State discretionary power over such Federal Instrumentalities. 13

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9 C. J. S., p. 544, 1090, 1094, 1253, 1255	17, 19, 20, 33
Shepherd's United States Citations [1943 Ed.] 2662	29

[References Required by Rules 12 and 27]

Opinions Below: *Anderson National Bank v. H. Clyde Reeves, Commissioner of Revenue*, 293 Ky. 735; R. 53-64; s. c. 294 Ky. 674; R. 89-90.

Jurisdictional Authority: Judicial Code §237a, as amended by Act of February 13, 1925, U. S. C. A. §344(a). Probable jurisdiction noted October 11, 1943 (R. 98).

Statutes Involved: Kentucky Revised Statutes [1942], Chapter 393 entitled "Escheats," §§393.060; 393.110; 393.130 (See Appendix, p. 45, *infra*).

Date of Judgment, etc. June 4, 1943 (R. 87-88); Affirmed June 15, 1943 (R. 89).

Nature of Case, etc. A 1940 Kentucky Act required all National Banks annually (1) to report *publicly* and (2) to *pay over*, to the Department of Revenue, *all moneys on deposit* in such National Banks, where the depositors—during the preceding 10 years [in the case of *demand* deposits], or during the preceding 25 years [in the case of all other deposits, *i. e.*, savings, time, certificates, etc.]—had not done anything with the deposit (K. R. S. 393.060, 393.130 (See Appendix, p. 45, *infra*).

Anderson National Bank sued the Commissioner of Revenue, *et al.*, to enjoin them from requiring National Banks to make the report, or to pay over such deposits, to the Department of Revenue (R. 2-15).

The Trial Court held part of the Act unconstitutional; and enjoined the State Officials from requiring any Banks to pay over the deposits, without first obtaining a judgment of a court of competent jurisdiction (R. 45-46).

On appeal and cross-appeal, the judgment was *reversed*; and the entire Act was *sustained* (*Anderson Nat. Bank v. H. Clyde Reeves*, 293 Ky. 735; R. 53-64). A new judgment was entered below; dismissing the petition (R. 87-88); which on a second appeal was affirmed (*Anderson Nat. Bank v. Reeves*, 294 Ky. 674; R. 89-90)—to review which this appeal was taken (R. 94-96). The same facts, and relief, prayed, exist as to *State Banks*.

Supreme Court of the United States

October Term, 1943.

No. 154.

ANDERSON NATIONAL BANK,

Appellant,

v.

H. CLYDE REEVES, Commissioner of Revenue,

et al.,

Appellees.

Appeal from the Court of Appeals of the State of Kentucky.

BRIEF IN BEHALF OF ANDERSON NATIONAL BANK.

The only questions involved are:

(1) Is *First National Bank v. California*, 262 U. S. 366 [called *San Jose* case], still the law? Or, will this Court now *overrule* it?—as California, Minnesota, Wisconsin, Kentucky and Michigan urge it to do.

(2) Can a State compel a *National Bank* annually (a) to *report publicly* the names, addresses and amounts of deposit of all depositors, and (b) to *pay over* to the State's Department of Revenue all those deposits in the Bank, where (c) demand deposits have been "dormant" for ten years, and savings and time deposits have been "dormant" for twenty-five years?

(3) Does the Act (KRS, §393.110) deprive both State and National Banks of their property "without due process of law"?

¹In 1940, the Kentucky Legislature expressly repealed all prior escheat legislation, to-wit: Ky. Stat. §§1610-1623 (1936 Ed.) and Acts 1938 ch. 165 known as Ky. Stat. §1609-(1-9). It then

[Note continued on following page]

RELEVANT STATUTES.

[Kentucky Revised Statutes 1942; Baldwin's 1943
Revision Annotated]

The relevant Kentucky Statutes are set out in full in the Appendix (p. 45, *infra*); but for convenient reference the only statutes really pertinent on this appeal are summarized as follows:

Kentucky Revised Statutes.

"393.060 [1610] Deposits in Bank or Trust Company Payable on Demand; When Presumed Abandoned.

Any deposit (legal, beneficial, equitable or otherwise) payable on demand in any bank or trust company in this state, together with the interest thereon **shall be presumed abandoned** unless the owner has, within ten successive years next preceding the date as of which reports are required by KRS 393.110:

- (1) Negotiated in writing with the bank or trust company concerning it;
- (2) Been credited with interest on the passbook or certificate of deposit on his request;

adopted a completely new "Escheat" Act [Act of March 1, 1940; Acts 1940 ch. 79; p. 333-349; §8 of which was later amended by Act of March 11, 1942, Acts 1942 ch. 156, p. 637-639], which was temporarily known as Ky. Stat. §§1605a; 1609-1622-1. [Baldwin's Kentucky Statutes Service; May, 1940; Number, p. 108-114] and was so referred to in the pleadings and in original trial below (R. 246).

In 1942 (during the first appeal), there was a complete official revision of Kentucky statutory law, effective October 1, 1942, known as "Kentucky Revised Statutes 1942" and cited as K.R.S., which was a re-writing and re-grouping of the former Carroll's Kentucky Statutes (1936 Ed.) and of Baldwin's 1938, 1940, 1941 Supplements thereto. Consequently, all citations in the opinions of the Court of Appeals [R. 53-64, 89-90] and in the proceedings subsequent to October 1, 1942 [R. 64-95] are to K.R.S.

"Baldwin's Kentucky Revised Statutes, Annotated," 1943 Revision, is the most convenient publication thereof, and all K.R.S. references in this Brief are made thereto.

- (3) Had a transfer, disposition of interest or other transaction noted of record in the books or records of the bank or trust company; or
- (4) Increased or decreased the amount of the deposit."

393.070 is the same as 393.060, *supra*, except that as to other than demand deposits (i. e., savings accounts, time deposits, certificates of deposit, etc.) the time is 25 years, instead of 10 years.

"393.110 [1611] Holders of Abandoned Property to Report to Department; Posting of Notices; Duty to Surrender Property to Department; Rights of Action.

(1) It shall be the duty of all state and National banks, trust companies, or other persons, and courts of this Commonwealth or the agents thereof, whether holding estates or property as bailee, depository, debtor, trustee, executor, liquidator, administrator, distributor, receiver, or in any other capacity coming within the purview of Section 7 of this Act [KRS 393.010(2); 393.060 to 393.100] to report annually to the Department as of July 1, all property held by them declared by this Act to be presumed abandoned. The report shall be filed in the offices of the Department on or before September 1 of each year for the preceding July 1, and shall give the name of the owner, his last known address, the amount and kind of property, and such other information as the Department may require for the administration of this Act. The report shall be made in duplicate; the original shall be retained by the Department, and the copy shall be mailed to the sheriff of the county where the property is located or held. It shall be the duty of the sheriff to post said copy on the courthouse door or the courthouse bulletin board. The sheriff shall immediately certify in writing to the Department the date when said copy was posted. Said copy must be posted on or before October 1, of the year when it is made, and shall be constructive notice to all interested parties.

and shall be in addition to any other notice provided by statute or existing as a matter of law.

(2) **Any person** who has made a report of any estate or property **presumed abandoned**, as required by this Act, **shall**, between November 1 and November 15 of each year, **turn over to the Department all property so reported**; but if the person making the report or the owner of the property shall certify to the Department by sworn statement that any or all of the statutory conditions necessary to create a presumption of abandonment no longer exist or never did exist, or shall certify the existence of any fact or circumstance which has a substantial tendency to rebut such presumption, then, the person reporting or holding the property shall not be required to turn the property over to the Department except on order of court. No person shall be required to surrender any property on a presumption of abandonment to the Department if the period of time provided by any statute of limitation applicable to the owner's rights as against the holder has expired unless the court orders him to do so. If a person files an action in court claiming any property which has been reported under the provisions of this Act, the person reporting or holding such property shall be under no duty while any such action is pending to turn the property over to the Department, but shall have the duty of notifying the Department of the pendency of such action.

(3) The person reporting or holding the property or any claimant thereof shall always have the right to a judicial determination of his rights under this Act, and nothing therein shall be construed otherwise; and the Commonwealth may institute an action to recover such property as is presumed abandoned whether it has been reported or not and may include in one petition all such property within the jurisdiction of the court in which the action is brought provided the property of different persons is set out in separate paragraphs" [393.110 as amended by Act March 11, 1942; Acts 1942, ch. 156, p. 637-639].

"393.130 [1613] Transferor to Department Relieved of Liability.

Any person who transfers to the department property to which the state is entitled under this chapter shall be relieved of any liability to the owner arising from that transfer. The state shall reimburse any person who cannot be relieved of such liability by this section for all liability to the owner of the property or estate or damage incurred by reason of compliance with this chapter."

393.230. (1) If a National Bank *refuses* to pay over the deposits to the Department of Revenue as provided in K. R. S. 393.110, *supra*, the Commissioner of Revenue may bring an equitable proceeding "to force payment" (Appendix, p. 45, *infra*).

(2) After a National Bank has paid over a deposit to the Department of Revenue on *presumption* of abandonment under K. R. S. 393.110(2), the Commissioner may "institute proceedings to establish *conclusively* that it was *actually* abandoned or that the owner has died and there is no person entitled to it" (Appendix, p. 45, *infra*).

393.290 and 393.990 provide penalties of fine or imprisonment, or both, for a National Bank refusing to make the report or to pay over the deposit as required by K. R. S. 393.110, *supra*.

A Bank's attack upon the constitutionality of a Statute, as applied to itself, cannot *ordinarily* be bolstered up by the Statute's alleged unconstitutionality as applied to the depositors;² but there is an exception to that rule (*Provident Savings Institution v. Malone*, 221 U. S. at p. 663;

²*Hatch v. Reardon*, 204 U. S. 152, 160; *Lee v. State of New Jersey*, 207 U. S. 67, 70; *Citizens Nat'l Bank v. Kentucky*, 217 U. S. 443, 453; *Provident Savings Institution v. Malone*, 221 U. S. 660, 665; *Dahmer v. Walker Co. v. Bondurant*, 257 U. S. 282, 289; *Heald v. District of Columbia*, 259 U. S. 114, 123; *Chicago Board of Trade v. Olsen*, 262 U. S. 1, 42; *Oliver Iron Co. v. Lord*, *Id.* 172, 180; *Massachusetts v. Mellon*, *Id.* 447, 488; *Aetna Ins. Co. v. Hyde*, 275 U. S. 410, 416; *Utah Power & L. Co. v. Pfost*, 286 U. S. 165, 186; *Premier-Pabst Co. v. Grosscup*, 298 U. S. 226, 227; *Virginian Ry. v. Federation*, 200 U. S.

Security Bank v. California, 263 U. S. at p. 290; p. 35, *infra*); and the principal provisions of the Statute applicable to the depositor are briefly summarized in the margin.²

STATEMENT OF FACTS.

1. *Nature of the case.* Anderson National Bank, [of Kentucky] sued Mr. Reeves, Commissioner of Revenue, the Kentucky Tax Commission, and the Attorney General, in the State Court, to enjoin them *inter alia* (R. 2, 14-15):

(1) From requiring all National Banks annually to pay over to the Department of Revenue all deposits, which K. R. S. 393.060 and 393.070 defined "shall be pre-

515, 558; *Voeller v. Neilston Co.*, 311 U. S. 531, 537; *Cf. Cumberland Pipe Co. v. Comm.*, 228 Ky. 453, 467; *Comm. v. Kentucky Jockey Club*, 238 U. S. 739, 759; *Stein v. Kentucky State Tax Com.*, 266 Ky. 469, 473; *Burrow, Com'r v. Kapfhammer*, 284 Ky. 753, 757; 16 C. J. S. "Constitutional Law" §76, notes 47, 48, 51, 52, 54-58; 16 Fed. Digest (1940) "Constitutional Law" §42, and cases there digested.

393.140(2)(3). After a National Bank has paid over a deposit to the Department of Revenue in accordance with K.R.S. 393.110(2), the depositor may file his claim to the deposit, unless it has already been adjudged under K.R.S. 393.230(2) to have been "actually abandoned."

The depositor must, within fifteen days after filing his claim, publish notice thereof in a newspaper of general circulation in the county where the deposit was held; or, if there is no such newspaper, the depositor shall post notice of his claim at the court house door and in three other conspicuous places, and file proof thereof with the Department of Revenue (Appendix, p. 45, *infra*).

393.150. The Commissioner "shall consider" the claim; and if established the Commissioner shall "authorize payment to him of a sum equal to the amount paid into the State Treasury" (Appendix, p. 45, *infra*).

393.160. If dissatisfied with the Commissioner's decision, the depositor may "within sixty days" appeal to the Franklin Circuit Court, or file an independent action in that Court to vacate the Commissioner's decision; with a right to appeal to the Court of Appeals "within sixty days after the judgment" (Appendix, p. 45, *infra*).

There is no provision for compelling the State, the Department of Revenue, or any other agency of the State, to pay the depositor, even if the Commissioner finds that the deposit was not actually abandoned.

sumed abandoned" after 10 years or 25 years as the case might be; and

(2) From requiring all *National Banks* annually to report to the Department of Revenue (i) the names and addresses of all their depositors and (ii) the several amounts of each deposit—which, fall within the K. R. S.'s definition of "*presumed abandoned*" deposits.

The same relief was sought for State Banks.

The lower court granted a very *limited* injunction; by which it only enjoined the defendants from requiring the Banks to *pay over* the deposits,

"without first obtaining an order or judgment of a court of competent jurisdiction requiring the delivery of such property" (R. 45-46).⁴

2. *Court of Appeals' decision.* In *Anderson Nat. Bank v. Reeves*, 293 Ky. 435, 744-747, the Court of Appeals (on appeal and cross appeal) held that the entire Kentucky "Escheat" Act was constitutional; and, so far as *National Banks* were concerned (R. 61-64),

(1) That the Escheat Act [K. R. S. 393.110, p. 3-4, *supra*] did not really declare an escheat at all; but that it only operated in such a way that:

"mere *custody*, as distinguished from *title*, is vested in the state by reason of dormancy and . . . [has no] tendency to cause depositors to hesitate to make deposits in national banks" (p. 746; R. 63);

(2) That *First Nat'l Bank [of San Jose] v. California*, 262 U. S. 366 (sometimes called the *San Jose Case*)

⁴On the ground that K.R.S. 393.110 was unconstitutional insofar; but only insofar, as [1] it required the deposits to be paid over to the Department of Revenue "without an order or judgment of a court of competent jurisdiction"; and [2] the posting of the report on the Court House door "shall be *constructive notice* to all interested parties"; and that the provisions for enforcing [1] were consequently unconstitutional (Judgment May 8, 1942. R. 45-46).

was not in point, for the alleged reason (R. 62) that this Court struck down the California Statutes, solely because "they were deemed by the Court [this Court] to be *escheat statutes confiscating the deposits solely by reason of dormancy*"; **whereas**, the Kentucky Statutes (applicable to National Banks' deposits) were *not* "escheat statutes" at all, but merely *transferred the custody* of the deposits from the National Banks to the State (p. 746; R. 63);

(3) That Kentucky would not follow *American National Bank v. Clarke*, Supt. of Banks, 175 Tenn. 480, or *Starr v. O'Connor*, 118 F. (2d) 548 (C. C. A. 6th), which held similar Tennessee and Michigan Statutes invalid as to National banks, for the alleged reason that the Kentucky Court of Appeals did not think the Supreme Court of Tennessee and the Circuit Court of Appeals (6th) appreciated the real basis of this Court's decision in the *San Jose Case* (p. 746; R. 63);

(4) That the Kentucky "Escheat" Act was good as to National Banks, because

"Since the Act in controversy does not provide for an escheat of deposits by reason of mere dormancy, as did the California statutes (title being vested in the state only after judicial determination of actual abandonment), and . . . the Act has no tendency to cause depositors to hesitate on account of apprehended fear of confiscation to make deposits in *national banks*. This being true there is no unwarranted interference with such banks and no frustration of the purpose of national legislation concerning them such as to render the Act invalid as to them" (p. 747; R. 63).

The Court of Appeals *affirmed* the judgment on the Bank's original appeal; but *reversed* it on the Commissioner's cross appeal (R. 53).

Upon the return of the case to the lower court, a new judgment was entered which sustained the Escheat Act in

its entirety; especially as applied to National Banks; and dismissed Anderson National Bank's petition (R. 87-88).

3. *Court of Appeals' decision on Second Appeal.* On Second Appeal the new judgment was *affirmed*, upon the ground that there was *no merit* in the Bank's contention (1) that the Escheat Act "conflicts with the National Banking Act"; or (2) "is violative of the due process clause" (R. 89; *Anderson Nat. Bank v. Reeves*, 294 Ky. 674)—to review which, the present appeal was taken; and probable jurisdiction has been noted (R. 94, 98).

ASSIGNMENT OF ERRORS.

The Court of Appeals of Kentucky erred in the following particulars:

I. In holding that K. R. S. 393.110 [requiring *National Banks* (under heavy penalty) to voluntarily pay over to the Department of Revenue all deposits on account of inactivity or dormancy] does not violate the National Banking Act [Assignment of Error No. 2; R. 93].

II. In holding that the State of Kentucky can take custody of deposits in *National Banks* on account of inactivity or dormancy [Assignment of Error No. 5; R. 93].

III. In holding that "there is no unwarranted interference with such (*National*) Banks, and no frustration of the purposes of national legislation concerning them such as to render the Act invalid as to them" [Assignment of Error No. 11; R. 94].

IV. In holding that K. R. S. 393.110 does not violate the "due process" clause of the 14th Amendment [Assignment of Error No. 3; R. 93].

SUMMARY OF POINTS DISCUSSED.

I. The Kentucky Court of Appeals carefully construed the Escheat Act [K.R.S. §393.110].

(1) It held that the provisions thereof applicable to National Banks (a) did not declare an escheat at all, but (b) merely transferred property [i. e., such deposits as the Act declared should be "presumed abandoned"] from the custody of the National Banks, and vested the custody of such deposits (not the title) in the State.

(2) That construction of the Escheat Act is binding upon this Court. (p. 11-13, *infra*.)

II. K.R.S. §393.110 (as so construed) is void, because:

(1) It interferes with the custody, duties, and conduct of National banks; and it regulates and frustrates the national purposes for which National Banks were created.

(2) It trespasses upon the field of Federal instrumentalities; which trespass, if sustained here, opens the door for unlimited State discretionary power over Federal instrumentalities. (p. 13-35, *infra*.)

III. K.R.S. §393.110, if enforced, will deprive both State and National Banks of their property "without due process of law." (p. 35-42, *infra*.)

IV. Response to the various Briefs filed in support of Kentucky's position. (p. 43-44, *infra*.)

FIRST POINT.

The Kentucky Court of Appeals carefully construed the Escheat Act.

1. It held that those provisions⁵ applicable to National Banks (a) did not declare an escheat at all; but (b) merely transferred property [i. e., such deposits as the Act declared should be "presumed abandoned"] from the "custody" of the National Banks; and vested the custody of such deposits (not the title) in the State.

2. That construction of the Escheat Act is binding upon this Court.

The Kentucky Court of Appeals carefully reviewed, summarized, or quoted, every material section of the Escheat Act (R. 53-56). It held that the Act *did not escheat* bank deposits; but merely compelled National Banks to *transfer the custody* of those deposits to the custody of the State (R. 58, 63; *Anderson Nat. Bank v. Reeves*, 293 Ky. 735, at p. 741, 746, 747). That same argument is urged by Kentucky's Attorney General (BRIEF, p. 49-50) and by Michigan as *amicus curiae* (BRIEF, p. 10-13, 16, 18).

The Kentucky Court of Appeals thus expressed its view that there was *no escheat* of bank deposits; but only a mere transfer of custody, saying (R. 58, 63; 293 Ky. at p. 741, 746-747):

"But the portions of the Act dealing with dormant bank deposits do not provide for a seizure of the deposits and vesting of title or ownership in the State but merely for a transfer of the property which may later be adjudged to be subject to escheat, and these provisions are for the benefit and protection of both the depositors and the State . . .

The good faith of the legislature cannot be questioned, and it is to be assumed that the Act was for the protection of the depositors as well as for the benefit of the State. . . . [After reviewing the

⁵K.R.S. 393.060; 393.070; 393.110; 393.130.

San Jose case] the Act differs from the California statutes in that **no escheat is declared** by reason of mere dormancy—the Act is one pursuant to which **mere custody**, as distinguished from title, **is vested in the State** by reason of dormancy and is not one of confiscation having the tendency to cause depositors to hesitate to make deposits in national banks . . .

Since the Act in controversy **does not provide for an escheat of deposits** by reason of mere dormancy as did the California statutes (title being vested in the State only after judicial determination of *actual* abandonment), . . . it is our opinion that the Act has no tendency to cause depositors to hesitate on account of apprehended fear of confiscation to make deposits in national banks."

By that language, the State Court *construed* the Escheat Act as follows:

(1) That *it did not escheat* the "dormant" deposits at the end of *ten, or twenty-five years* (as the case might be); but

(2) That it simply required *National Banks* [and State Banks also] *to pay to the State* all those deposits which the Act *legislatively* declared to be "presumed abandoned."

The Act, thereby, *substituted* the Kentucky Legislature's judgment regarding *National Banks*' "dormant" deposits, in place of Congress' judgment on that subject (p. 19-20, *infra*).

That State Court *construction* of the Act is binding upon this Court.

In *Minnesota v. Probate Court*, 309 U. S. 270, 273, after quoting the State Court's construction of what the statute intended, this Court said (p. 273):

"This construction is binding upon us. Any contention that the construction is contrary to the terms of the Act is unavailing here. For the purpose of deciding the constitutional questions appellant raises

we must take the statute as though it read precisely as the highest court of the State has interpreted it. *Knights of Pythias v. Meyer*, 265 U. S. 30, 32; *Guaranty Trust Co. v. Blodgett*, 287 U. S. 509, 513; *Hicklin v. Coney*, 290 U. S. 169, 172; *Georgia Railway & Electric Co. v. Decatur*, 295 U. S. 165, 170."⁶

SECOND POINT.

K. R. S. §393.110 (as so construed) is void, because:

1. It interferes with the custody, duties, and conduct of National Banks; and it regulates and frustrates the national purposes for which National Banks were created.

2. It trespasses upon the exclusive field of Federal instrumentalities; which trespass, if sustained here, opens the door for unlimited State discretionary power over such Federal instrumentalities.

K. R. S., §393.110 requires all National Banks annually to pay over to the State all deposits which fall within the Act's definition of deposits which "shall be presumed abandoned" (Cf. §§393.060, 393.070).⁷

Kentucky asserts that it has that power (without the necessity of any judicial proceedings whatever), because it claims that,

⁶To the same effect, see *Storaasli v. Minnesota*, 283 U. S. 57, 62; *St. Louis S. W. Ry. v. Arkansas*, 235 U. S. 350, 362; *Madden v. Kentucky*, 309 U. S. 83, 87, note ³; *Detroit & Mackinac Ry. v. Paper Co.*, 248 U. S. 30, 31; 35 C. J. S. "Federal Courts," §171, p. 1247-1252, notes ²³⁻²⁴, for a wealth of citation of this Court's decisions.

⁷The Kentucky Court of Appeals held that the Act *did not* escheat the deposits (p. 11-12, *supra*).

This holding was necessary, because, if it *were* an Escheat Act, it would be void: (a) as violative of long-established rules and prohibitions governing escheats (R. 57; 30 C. J. S., p. 1167-1171); and (b) as directly counter to the *San Jose* case (262 U. S. 366).

Therefore, this appeal does not even present the question whether (in *escheat* proceedings against the "owner" of the deposit) the State has the power to declare that the "owner's" deposit "shall be presumed abandoned" after ten (or twenty-five) year's dormancy.

(1) It can *legislatively* determine when *National Banks'* deposits "shall be *presumed* abandoned";

(2) "For the benefit and protection of both the depositors and the State," it can compel all *National Banks* to surrender the custody of such deposits to the State, to the end that, thereafter, the State may, or may not, as it pleases, take subsequent independent escheat proceedings against the depositor alone "to establish conclusively that it was actually abandoned" [K. R. S. 393.060; 393.110; 393.230(2)]; and

(3) The State has legislatively *exonerated* the *National Banks* from any liability to the depositors; or, if that be impossible, the State will "reimburse" such *National Banks* for any liability to the depositors [K. R. S. 393.103].

The constitutional question involved is simply this:^a

Can Kentucky compel *National Banks* (under penalty of fine or imprisonment, or both) to pay over to the State the money, which depositors—not merely Kentucky depositors, but depositors from many other States, *Bank of Jasper v. First Nat. Bank*, 258 U. S. 112, 119—have voluntarily chosen to leave on deposit in a *National Bank* in Kentucky?—with power in Kentucky (by legislative action) to *define*^b *for itself* the conditions under which it will compel the *National Banks* to pay over their deposits to Kentucky?

Stated a little differently: Are the operations of *National Banks*, their deposits, and their relations to their depositors, controlled exclusively by Congressional legislation? Or, are the custody of their assets, and their operations subject to the varying legislative demands of the 48 States?

^aIt is not a question of what Kentucky can do with respect to its own *State Banks*, who owe their very existence, rights and obligations solely to Kentucky. The question here involved relates solely to *National Banks*.

^bIf Kentucky has the constitutional power to *define* the conditions under which it will compel the transfer of *National Banks'* deposits to the State, no one can control the definition adopted, as that would rest within the legislative discretion of the State.

Hence the constitutional importance of this appeal to all National Banks—vastly transcending any question of mere long-dormant deposits.

We insist that Kentucky does not have the power it asserts.

We submit;

I. *National Banks are Federal instrumentalities of the highest order—free from control or regulation by the States—and subject only to such control and regulation as Congress prescribes, or has affirmatively permitted the States to prescribe.*

1. National Banks were created by Congress to do a *private* banking business; backed by *private* capital; for the *private* profit of their stockholders; and subject only to Federal Control—all in order that they might effectively carry out the national purposes for which they were primarily created (*M'Culloch v. Maryland*, 4 Wheat. 316, 408, 422; See arguments of Mr. Webster, Attorney General Wirt, and Mr. Pinkney, at p. 325-326, 352-356, 389-396; *Osborn v. Bank*, 9 Wheat. 738, 860-864; *Smith v. Kansas City Title Co.*, 255 U. S. 480, 208-211).¹⁰

¹⁰The numerous authorities cited below show that the First and Second Banks of the United States, and the present National Banking System, were created by Congress to do a *private* banking business, so that by receiving vast private deposits of individuals and corporations, those banks could be, and, for more than 100 years, they have been *actually* and effectively, used as instrumentalities of the Federal Government, in order *inter alia*, (i) to enable the Government to wage war, to carry on its fiscal operations, and to obtain loans in anticipation of its revenues; (ii) to buy Government Bonds, to receive subscriptions therefor, and to distribute them among public investors, and thereby provide a market for Government Bonds; (iii) to facilitate the payment of Federal taxes, and the payment of troops; (iv) to collect, safeguard and transport money, to transfer public funds from place to place, with-

[Note continued on following page]

2. In the midst of this Great War, the following figures illustrate the vital importance of National Banks, in their capacity of private banking, as *financial instrumentalities* of the Federal Government:

14,775 State and National Banks	
have	\$96 billion deposits
9,775 State Banks have only	\$41 billion deposits
5,000 National Banks have	\$55 billion deposits

Of their \$55 billion deposits, National Banks have invested over \$30 billion thereof in U. S. Government Bonds. That is, they have invested nearly *sixty per cent* (60%) of their total deposits in Government Bonds; and they hold

out cost to the Government or loss to it on account of any difference in exchange; and (v) to furnish depositories at convenient places throughout the country for public funds, at a time when every Collector of Federal taxes was afraid to deposit money in State Banks, although responsible for the public funds so collected, and yet had to hold it in his physical, personal possession, subject to the dangers of fire and accident, as the Government did not even furnish an office safe for the safekeeping of money.

BANK OF THE UNITED STATES. *McCulloch v. Maryland*, 4 Wheat. 316, 407-409; *Osborn v. Bank*, 9 Wheat. 738, 861-864; Beveridge's Life of John Marshall, Vol. 4, pp. 171, 176-195; Holdsworth & Dewey's "First and Second Banks of the United States"; McMaster's History of the People of the United States, Vol. 2, p. 29; *Id.*, Vol. 4, p. 280 *et seq.*; especially pages 300-318; Hamilton's Report on a National Bank; Lincoln's Speech in reply to Douglas, December, 1839, Vol. 1, p. 197-198 of "Lincoln's Writings," Constitutional Ed.

NATIONAL BANKING SYSTEM. Lincoln's Veto Message of June 23, 1862 (6 Messages and Papers of the Presidents, p. 87, 88); Lincoln's 2nd Annual Message, Dec. 1, 1862 (*Id.*, p. 126, 129-130); Rhodes' History of the United States, Vol. 4, p. 237-239; Noyes' "History of the National Banking Currency," p. 41; Davis' "The Origin of the National Banking System," p. 79, 80, 89, 106, 109; *Veazie Bank v. Fenno*, 8 Wall. 533, 536-539, 548; *Farmers & Nat. Bk. v. Dearing*, 91 U. S. 29, 33; *First National Bank v. Union Trust Co.*, 244 U. S. 416; *Smith v. Kansas City Title Co.*, 255 U. S. 180, 209, 211-213.

nearly *one-third* of all Government Bonds in which they are allowed to invest.

But that is not all:

Practically the *entire balance* of all National Banks' assets is held in (i) cash, and (ii) loans to *war industries*, in order to finance, and to carry on, the United States' War requirements.

Nothing more need be added to show the vital part which National Banks, as Federal instrumentalities (using private deposits in their private banking business), play in financing the United States Government.¹¹

3. National Banks, as Federal instrumentalities, are free from control or regulation by the States (*Easton v. Iowa*, 188 U. S. 220, 238; 9 C. J. S., p. 1094, 1255, and cases cited, and reviewed p. 24 *et seq.*, *infra*).

II. K. R. S. §393.110 is void because it regulates, and interferes with, the duties, the conduct, and the custody of the assets, of National Banks as Federal instrumentalities.

The very foundation of the banking business is to receive, and hold deposits (9 C. J. S. p. 1253). National Banks exercise the Federal power "to carry on the business of banking . . . by receiving deposits . . . dealing in and purchasing for its own account investment securities . . . [without limitation or restriction in the amount purchased of] obligations of the United States" [National Banking Act §24; 12 U. S. C. A. §24, as amended June 11, 1940, c. 301; 54 Stat. 261; 9 C. J. S. 1094].

In carrying out its *private* banking business, in order, not merely to make a private profit for its shareholders,

¹¹The deposits in National Banks are not simply those of local individuals, and corporations of the particular State in which the National Bank is located, but in large measure (and particularly so in all of the larger banks, which are contributing most to the financing of the War), the depositors are *not* from the particular State in which the bank is located, but are individuals, and especially corporations, from many other States.

but to act as a vital Federal instrumentality, *inter alia*, in the purchase of Government Bonds, it receives deposits of vast numbers of individuals, firms, public and private corporations;—with which private funds it carries on its banking business and largely *finances* the present War.

(1) Kentucky declares that National Banks *must surrender to the State* custody of all deposits which the State defines as “presumed abandoned.” That Act interferes with the National Banks’ custody of the funds which have been deposited with it.

Every dollar of deposit, the custody of which is taken away from the National Banks and vested in the State, reduces, *pro tanto*, the National Banks’ ability to buy Government Bonds, or to lend money to borrowers in the prosecution of its Federally authorized business of banking. That certainly *interferes* with the National Bank’s conduct of its business. “Dormant” deposits are the very ones that can most safely be invested in U. S. Bonds.

To carry out the mandate of the Kentucky Act, National Banks must, *pro tanto*, reduce their cash on hand, or call loans, or sell securities, to enable them to comply annually with the Act.

But that is not all:

(2) The Act requires National Banks annually to file a public report, giving the name and address of every depositor, and the amount of his deposit which has been inactive for the past ten, or twenty-five years (as the case may be), which report must be posted annually at the court house door in the county where the National Bank is located [K. R. S. 393.110(1)].

That requirement certainly *regulates* National Banks’ conduct of their business. It gives public notice to its State Bank competitors of the names, addresses, and amounts of deposit, of certain of its depositors. The list of a bank’s depositors, with their addresses and amounts of deposit, are a highly valuable and confidential bank

record; because, if made public, (a) it makes the bank subject to raids by its public and private banking competitors to obtain the business of such depositors, and (b) it deters depositors, both local, and especially from other States, from depositing their funds in a bank which is required to give such public information concerning the depositor's private accounts.

But that is not all:

(3) When National Banks receive deposits, a contractual relation is established between the depositor and the Bank, by which the Bank must, on demand, pay the money to the depositor (*Davis v. Elmira Savings Bank*, 161 U. S. 275, 288; 9 C. J. S. p. 544 *et seq.*). That duty is created by the National Banking Act.

Kentucky has undertaken to dissolve that relation between National Banks and a large number of their depositors, (a) by compelling the Bank to pay the deposit to the State, instead of to the depositor; and (b) by attempting to relieve the Bank of its obligation to repay and to substitute the State in its place against the National Bank's wishes (K. R. S. §393.130). The State is thereby certainly *interfering* with the duties and conduct of the National Banks' operations in their banking business.

The State has no such power over Federal instrumentalities.

But that is not all:

(4) Congress has never dealt with so-called inactive or dormant deposits, nor made any provision for their disposition.

Under the Banking Act; before Congress; and at the bar of the Federal Government; inactive and dormant deposits **stand exactly like the most recent and active deposits.**

Kentucky has dealt with the National Banking System; and made a new classification of the banking business in

the field of keeping, and paying out, deposits. In doing so, Kentucky has assumed to regulate the duties and conduct of Federally incorporated banks, regarding inactive and dormant deposits.

Congress has the sole power to regulate and control the operations of National Banks, which are subject to the paramount authority of the United States. Kentucky's attempt to define National Banks' duties, and to control the conduct of their officers in retaining deposits or paying them out, is absolutely void, because Kentucky has attempted to modify and change that which Congress created, *i. e.*, the relation of National Banks to their depositors (9 C. J. S. 1090, 1094, and the wealth of authorities there cited).

But that is not all;

(5) A National Bank's solvency or insolvency might depend upon whether it could quickly recover from the State the amount of the dormant deposits, should the depositors demand payment from the Bank. (See p. 24, 41, 42, *infra*.)

III. *K. R. S. §393.110 is void, because it trespasses upon the exclusive field of Federal instrumentalities; which trespass, if sustained here, opens the door for unlimited State discretionary power over Federal instrumentalities.*

This Court has constantly had to protect Federal agencies and instrumentalities from interference by State legislation—not because the degree of interference, in the particular case, was so great as to be vital *per se*, but because of the *obsta principis* principle, applied equally against Congressional infringement of individual rights under the Constitution (*Boyd v. U. S.*, 116 U. S. 616, 635), and a State's interference with Congressional prerogatives (*First Nat'l Bank v. California*, 262 U. S. 366, 370).¹²

¹² This Court has often pointed out the necessity for protecting federal agencies against interference by state legislation.

Kentucky asserts the right to make a "transfer of property," from National Banks to itself as custodian (R. 58), upon the ground that:

(1) "the Act is one pursuant to which mere custody, as distinguished from title, is vested in the State by reason of dormancy" (R. 63);

(2) "The good faith of the Legislature cannot be questioned and it is to be assumed that the Act was for the protection of the depositors as well as for the benefit of the state" (R. 58).

If this Court upholds the transfer to the State Department of Revenue of perhaps hundreds of thousands of dollars on deposit in National Banks (a) for the reasons (1) and (2) assigned by the Kentucky Court of Appeals; and (b) because of an inability to question the "good faith of the [State] Legislature," let us examine the consequences of that novel ground for dealing with Federal instrumentalities:

1. The Kentucky Legislature was in session in 1933—the year of the bank crisis and universal closing. Suppose it had passed an act reciting that "for the protection of the depositors as well as for the benefit of the State," all National Banks must deposit 25%, or 50%, of the National Bank's assets with the State's Department of Revenue. Would that be an unlawful interference with Federal instrumentalities? or would it be sustained, because the Legislature's "good faith" could not be questioned; and it was acting for the protection of the depositors and for the benefit of the State?

The approved principle of *obsta principis* should be adhered to. *McCulloch v. Maryland*, 4 Wheat. 316; *Osbörn v. United States Bank*, 9 Wheat. 738; *Farmers' and Mechanics' National Bank v. Dearing*, 91 U. S. 29; *California v. Central Pacific R. R. Co.*, 127 U. S. 1; *Davis v. Elmira Savings Bank*, 161 U. S. 275; *Easton v. Iowa*, 188 U. S. 220; *Corington v. First National Bank*, 198 U. S. 100; *Farmers and Mechanics Savings Bank v. Minnesota*, 232 U. S. 516; *Choctaw, Oklahoma & Gulf R. R. Co. v. Harrison*, 235 U. S. 292; *Bank of California v. Richardson*, 248 U. S. 476.

The Kentucky Legislature might have thought in "good faith" that, in view of the national scandals centering at that time upon certain New York, Detroit and other large National Banks, the Kentucky depositors would be better protected by having at least a part of their deposits safely in the hands of the State.

2. Or, under substantially the same circumstances assumed in 1, suppose the Legislature attempted to compel National Banks to transfer to the custody of the State *all* of their assets, up to an equality with the amount of their deposit obligations to their depositors.

3. Traditionally, for many years, the Treasury Department [Comptroller of the Currency] insisted that National Banks should have a Capital, Surplus, and Undivided Profits of about 10% of their Deposits—commonly known as the 10 to 1 ratio.

During the last few years, with the enormous War expenditures, necessary expansion of credit, and consequent increase in deposits, many National Banks, of unquestioned solvency and strength, have had their Deposits greatly increased, so that the ratio of Capital, Surplus, and Undivided Profits to Deposits, instead of being limited to 10 to 1, has in many instances arisen to 20 to 1 or 25 to 1, or even to 30 to 1.

Suppose the Kentucky Legislature passed an act reciting and approving the long-established 10 to 1 rule or practice of the Treasury Department, its disregard by countless National Banks; and then compelling all National Banks to transfer the *custody*—though not the title—of so much of their deposits (*i. e.*, assets representing deposits) as would reduce the ratio of each National Bank to (say) 15 to 1.

If the "good faith" of the Legislature, acting for the protection of the depositors and the benefit of the State, is to be the constitutional test of State action with respect

to Federal instrumentalities [as the Court of Appeals relies on in the case at bar, R. 58], what legal argument would exist against the validity of such an Act?

4. Suppose Kentucky passed an act prohibiting any bank, State or National, from receiving deposits in excess of a ratio of 10 to 1 of their Capital, Surplus, and Undivided Profits, on the ground that, for the protection of the depositors and the benefit of the State, the long traditional Treasury Department ratio must be maintained. There is no Congressional legislation on the subject, yet would not that be an *interference* by the State with the Federal instrumentality?

5. Instead of requiring a public posting of all dormant accounts of ten or twenty-five years' standing (as the case might be) suppose Kentucky—adopting the *San Jose* case suggestion (262 U. S. at p. 370)—compelled all banks, State and National, to post at the court house door a list of all deposits dormant for (say) only *three* years.

Or, to go a step further, suppose the Act provided for posting a list of all deposits, *active* or dormant, of *three* years' standing.

6. Suppose the Kentucky Legislature "for the benefit and protection of both the depositors and the State" (R. 58), provided that all banks, State and National, should annually file as a public record a list of all their securities, bonds, notes, loans, or other investments. Such an Act would not interfere with the *custody* of the assets, nor perhaps with the duties or operations of the bank; yet, would it not *interfere* with a Federal instrumentality?—although the full disclosure of all the Bank's assets might be very enlightening to depositors in determining which banks were the safest in which to deposit money.

7. Or suppose Kentucky required all banks annually to post a list of all the bank's loans, if any, to Directors, stockholders, officers, or employes. Such disclosure could

be well defended as desirable, to prevent looting of the banks by those interested in its management, and to afford the public some guidance as to the bank's solvency.

Would the foregoing supposititious State Acts be good or bad?

8. If a National Bank must pay all its dormant deposits to the State, the Bank's cash (available to pay its depositors) is *correspondingly reduced*; and in place thereof it simply has a dubious, unliquidated, unsecured, possible claim against the State, which in times of stress would not be available to pay depositors (p. 41-42, *infra*).

In the Banking Crisis (1932-1933), many depositors checked out long dormant accounts. If those deposits had been previously paid to the State, the Bank's solvency itself might have been destroyed through its inability to sell, or otherwise realize upon, its non-negotiable claim against the State—even assuming (which is very, very doubtful) that it might *ultimately* collect from the State (p. 41-42, *infra*).

Would not such a situation interfere with a National Bank's operation of its banking-deposit business?

This Court must decide what constitutes a State interference with a Federal instrumentality. As a guide on that subject, it would be well to make

A REVIEW OF THE AUTHORITIES.

In *Easton v. Iowa*, 188 U. S. 220, 238, this Court held that, as far as National Banks were concerned, the State had no power to punish a bank official for accepting a deposit with knowledge of the bank's insolvency; and the principle on which the present appeal is based was thus aptly stated (p. 238):

"Our conclusions, upon principle and authority, are that Congress, having power to create a system of national banks, is the judge as to the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control the exercise of their operations; . . . that it is not com-

petent for state legislatures to interfere, whether with hostile or friendly intentions, with national banks or their officers in the exercise of the powers bestowed upon them by the general government."

The most important function of every National Bank is to receive deposits, to keep safe custody thereof, and, on demand, to repay them to the depositors.

This Court has repeatedly held (1) that the States have no power to regulate, control, hamper, or interfere with, the free and untrammelled operation of National Banks, as instrumentalities of the Federal Government, in the conduct of their *private banking business*; and (2) that the States cannot interfere with the efficiency of National Banks in discharging their duties as *private banks*, in receiving deposits, maintaining their custody, and ultimately repaying them to the depositors—for which functions National Banks were primarily created in order to be effective Federal instrumentalities (p. 20-21, *supra*).

It is needless to review, or quote from, the multitude of cases on that subject, although some of them are cited in the margin.¹³

¹³A multitude of cases are cited in 61 C. J., p. 281 *et seq.*, 371 *et seq.*, notes ⁹²⁻⁹⁹.

See also *McCulloch v. Maryland*, 4 Wheat. 316; *Osborn v. United States Bank*, 9 Wheat. 738; *Farmers and Mechanics' National Bank v. Dearing*, 91 U. S. 29; *California v. Central Pacific R. R. Co.*, 127 U. S. 1; *Davis v. Elmira Savings Bank*, 161 U. S. 275; *Easton v. Iowa*, 188 U. S. 220; *Corvinton v. First National Bank*, 198 U. S. 100; *Farmers and Mechanics' Savings Bank v. Minnesota*, 232 U. S. 516; *Choctaw, Oklahoma & Gulf R. R. Co. v. Harrison*, 235 U. S. 292; *Bank of California v. Richardson*, 248 U. S. 476; *Lewis v. Fidelity Co.*, 292 U. S. 535, 564, 566; *Forrest v. Jack*, 294 U. S. 158, 162; *Seabury v. Green*, 294 U. S. 165, 169; *Domenech v. National City Bank*, 294 U. S. 199, 205; *Des Moines Bank v. Fairweather*, 263 U. S. 103, 106, 107; *Old Company's Lehigh v. Meeker*, 294 U. S. 227, 230-231; *Jennings v. United States Fidelity & Guaranty Co.*, 294 U. S. 216; *Rankin v. Barton*, 199 U. S. 228, 231-232; *Christopher v. Norrell*, 201 U. S. 216, 225; *First Nat'l Bank v. Missouri*, 263 U. S. 640, 656, 662-665; *Fed. Land Bank v. Bismarck Co.*, 314 U. S. 95, 102-103; *Standard Oil Co. v. Johnson*, 316 U. S. 481, 485; *Maricopa County v. Valley Bank*, 318 U. S. 357, 361; *Mayo v. United States*, 319 U. S. 441, 445; *Oklahoma Tax Comm'n v. United States*, 319 U. S. 598, 603.

Bearing in mind "that the activities of the Federal Government are free from regulation by any state"; and that "it is necessary for uniformity that the laws of the United States be dominant over those of any state" (*Mayo v. United States*, 219 U. S. 441, 445), a few pertinent cases will be noticed:

The California National Bank Case.

In *First Nat'l Bank v. California*, 262 U. S. 366 (*San Jose Case*), California Statutes provided that the State might sue banks, and their depositors, to recover all twenty-year-old dormant deposits, as escheated to the State; with a provision for an ordinary trial, judicial determination, and judgment; which, if in favor of the State, should command the bank to pay the deposits to the State Treasurer, to be handled as provided by law in the case of other escheated property.

The State sued the First National Bank to escheat one Campbell's \$1,192.25 twenty-year-old dormant deposit; and, after trial, judgment was rendered against the Bank, affirmed by the Supreme Court of California (186 Cal. 746).

On writ of error, this Court *reversed* the case, and held that the California Statutes were not applicable to National Banks, saying (p. 368):

"Section 5136, U. S. Revised Statutes, confers upon national banks power to receive deposits, which necessarily implies the right to accept loans of money, promising to repay upon demand to lender or his order. These banks are instrumentalities of the Federal Government. Their contracts and dealings are subject to the operation of general and undiscriminating state laws which do not conflict with the letter or the general object and purposes of congressional legislation. But any attempt by a State to define their duties or control the conduct of their affairs is void whenever it conflicts with the laws of the United States or frustrates the purposes of the national legislation or impairs

the efficiency of the bank to discharge the duties for which it was created. *Davis v. Elmira Savings Bank*, 161 U. S. 275, 283, 288, 290.

"National banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. . . . Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is 'an abuse, because it is the usurpation of power which a single State cannot give.' " *Farmers' and Mechanics' National Bank v. Dearing*, 91 U. S. 29, 33, 34.

Congressional legislation in respect of national banks "has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the States." *Easton v. Iowa*, 188 U. S. 220, 229.

Plainly, no State may prohibit national banks from accepting deposits or **directly impair their efficiency in that regard**. And we think, under circumstances like those here revealed, a **State may not dissolve contracts of deposit even after twenty years and require national banks to pay to it the amounts then due**; the settled principles stated above oppose such power.

Does the statute conflict with the letter or general object and purposes of the legislation by Congress? **Obviously, it attempts to qualify in an unusual way agreements between national banks and their customers long understood to arise when the former receive deposits under their plainly granted powers. If California may thus interfere other States may do likewise; and, instead of twenty years, varying limitations may be prescribed—three years perhaps, or five or ten, or fifteen.** We cannot conclude that Congress intended to permit such results. They seem incompatible with the purpose to establish a system of governmental agencies specifically empowered and expected **freely to**

accept deposits from customers irrespective of domicile with the commonly consequent duties and liabilities. **The depositors of a national bank often live in many different States and countries; and certainly it would not be an immaterial thing if the deposits of all were subject to seizure by the State where the bank happened to be located.** The success of almost all commercial banks depends upon their ability to obtain loans from depositors, and these might well hesitate to subject their funds to possible confiscation.

This Court has often pointed out the necessity for protecting federal agencies against interference by state legislation. The approved principle of *obsta principis* should be adhered to. [Citation omitted of the ten cases cited at p. 21 note, *supra*]."

That case is directly in point; not because it was an "escheat" case (which is not so in the case at bar, p. 11-12, *supra*), and this Court never even used the word "escheat," or referred to that subject, *in its entire opinion*, but for this more important reason:

If California (having carefully observed all the traditional legal pre-requisites and procedure to enforce an escheat of a twenty-year-old dormant deposit) is forbidden to do so, **because such action would interfere with a National Bank's relation to its depositors**; then, *a fortiori*, Kentucky cannot, by the mere *ipse dixit* of a Legislative Act, compel a National Bank, under heavy penalties, to transfer to the State, ten-year and twenty-five-year-old dormant deposits, *without any legal proceeding against either the bank or the depositor*.

**The California State Bank Case is not in point as to
a National Bank.**

A few months later, in *Security Bank v. California*, 263 U. S. 282, the same situation arose, under the same California Statutes, and by the same procedure, with respect to dormant deposits in a California State Bank. The State Courts sustained a judgment, which declared escheat, and

ordered the Bank to pay over the deposit to the State. The State Bank claimed that the Statutes denied it due process of law. (See p. 39-40, *infra*.)

This Court reiterated (p. 284, note ²):

“That the statutes are invalid as applied to *national* banks was settled in *First National Bank v. California*, 262 U. S. 366.”

Therefore, the *Security Bank* case has no application to the *National Bank* here; and it is not in point in considering whether the California or Kentucky Statute interferes with a *National Bank* as a Federal instrumentality—unless this Court wishes to *overrule First Nat'l Bank v. California*, 262 U. S. 366, which the Kentucky Attorney General and three *Amicus Curiae* Briefs [Minnesota, Wisconsin, Michigan, and California] strongly urge it should do.¹⁴

In view of this Court's re-affirmance¹⁵ of that case, and its wide acceptance by State and Federal Courts (See *Shepard's United States Citations*, 1943 Ed., p. 2662; October Issue, p. 145; November Issue, p. 14), we see no reason now to submit any argument to sustain this Court's decision. We are entitled to rely on what this Court has decided.

Other cases directly in point.

In *National City Bank v. Philippine Islands*, 302 U. S. 651, the judgment was reversed upon the re-affirmed authority of *First National Bank v. California*, 262 U. S. 366.

In *American Nat. Bank v. Clarke*, 175 Tenn. 480, a Tennessee Statute (substantially similar to the Kentucky Statute) provided that deposits of fifteen or twenty-five years' dormancy “shall be deemed to be abandoned property and shall be turned over to the State of Tennessee,” with a

¹⁴Kentucky Attorney General's BRIEF, p. 55; and *Amicus Curiae* BRIEFS: For Minnesota and Wisconsin, p. 2-3, 14-15; For California, p. 5, 12; For Michigan, p. 20.

¹⁵*Security Bank v. California*, 263 U. S. at p. 284; *National City Bank v. Philippine Islands*, 302 U. S. 651; *Colorado Bank v. Bedford*, 310 U. S. at p. 50, note ²⁴.

public report of the names and addresses of the depositors, and the amounts of such dormant deposits.

As in the case at bar, *there was no provision for legal proceedings to escheat*, or to test the title of the deposits, before requiring the bank to pay over the deposits to the State.

The Supreme Court of Tennessee held that the Tennessee Statute *was void* as applied to *National Banks*, saying:

"Among other powers conferred by the Congress upon national banks is the right to receive deposits of money. **Without the free exercise of this right, as regulated by Federal legislation, the banks could not survive. Hence, it can be readily seen that any state law which interferes with this right is in conflict with the laws of the United States, and therefore, void.**

The Act here in question is not an escheat statute, but is one where the state has undertaken to say that funds to the credit of a depositor in a "banking institution" (including a national bank), where the account has remained inactive for fifteen successive years, or for the period of twenty five years in the case of savings funds and time deposits, "shall be deemed to be abandoned property and shall be turned over to the State," *without any judicial proceeding brought against the bank, or the depositor*, to have the funds declared abandoned property. . . . But, as above stated, the Act there in question is not an escheat law. It merely requires that a bank turn over to the State the funds to the credit of a depositor, when his account had remained inactive for a term of years."

The Court quoted at length from *First Nat'l Bank v. California*, 262 U. S. 366; denied that its authority had been impaired by any subsequent decisions; and aptly pointed out the difference between escheat statutes, or the transfer of deposits, (a) in the case of *National Banks*, and (b) in the case of *State Banks*.

In *Starr v. O'Connor*, 118 F. (2d) 548 (C. C. A. 6th; cert. den. 314 U. S. 695), the Court dealt fully with the Michigan Escheat Statutes (as applied to the Receiver of the First National Bank) which provided that Michigan should receive by escheat all dormant deposits in failed banks; and that the Bank's Receiver should "transfer all such escheated deposits" to the State.

The C. C. A. carefully considered the Supreme Court of Michigan's declaration "that escheat proceedings under Michigan laws are not solely for the benefit of the state, but are also designed for the conservation by the state of the property possessed for the benefit of any person lawfully entitled subsequently to receive it"—substantially the same declaration that the Court of Appeals of Kentucky made in the case at bar (R. 58).

After quoting at length from the *San Jose* case (262 U. S. 369, 370), the C. C. A. held that it was "direct and controlling," and that the Michigan Statute "constitutes an unlawful interference with the liquidation of a national bank."

The same result may be reached from another approach to the subject.

In *Smith v. Kansas City Title Co.*, 255 U. S. 186 (on argument and re-argument), and *Federal Land Bank v. Bismarck Co.*, 314 U. S. 95, it was held that Federal Land Banks were constitutionally created; and that farm mortgages and mortgage bonds, and even purchases of materials for improving bank property, were exempt from State taxation, because the Federal Land Banks were Federal instrumentalities.

The important thing about those decisions is that, at the time of the decision in the *Kansas City Title* case, the Land Banks had never accepted any deposits, nor engaged in any banking business, nor performed any duties as depositories of public money. Indeed they had never *don*

anything as an instrumentality of the Federal Government. Nevertheless, this Court held that the mere naked *existence* of Federal Land Banks, *with the power* to become a Federal instrumentality if the Government chose so to use it, was enough to make them Federal instrumentalities; and that the States could not tax even the ordinary mortgage, or mortgage bond, which a farmer might execute for the purpose of borrowing money from a Land Bank.

This Court said (p. 213):

“If the States can tax these bonds they may destroy the means provided for obtaining the necessary funds for the future operation of the Banks.”

Federal Land Banks and Joint Stock Land Banks combined have bought only a comparatively *small* amount of Government Bonds, averaging perhaps \$50,000,000. Otherwise they have never acted as Federal instrumentalities. They merely had the naked potential *power* to do so; and yet *billions* of dollars of farm mortgage bonds have been completely *exempt* from all State taxation, merely because such Banks are *potential* Federal instrumentalities.

If, then, a Federal instrumentality may be made completely exempt from State taxation, is it not obvious that National Banks, who every day are acting as *actual* Federal instrumentalities, to the extent, in one phase only, of purchasing *thirty billions of dollars* of Government Bonds (or nearly a third of the entire available market) should certainly have their deposits *protected from raiding by the States?*

.

The National Banking Act created National Banks; authorized them to do a banking business by receiving deposits, and dealing therewith in the usual way that bankers have always dealt with deposits. No matter how long deposits may be dormant, the States have no right, even by the most technical escheat proceedings, to take those deposits away from *National Banks*.

The Kentucky Statute, which baldly orders National Banks to transfer their dormant accounts to the State (under heavy penalties for failure to do so), *interferes* a great deal more with National Banks, than the California, Michigan and Tennessee escheat laws did.

Whether a State (by escheat statute) seeks to obtain both possession *and* title to deposits (California and Michigan statutes); or, by the Kentucky and Tennessee Acts, *compels* a transfer of the custody (even without the title) to the State, the result is the same. They both *interfer* with National Banks' conduct of their deposits, as authorized by Congress; and with which the States have no right to interfere. The text-writers have reached the same conclusion (9 C. J. S., "Banks and Banking," p. 1255; 7 Am. Jur., Banks and Banking," p. 291).

Congress has never legislated respecting so-called dormant accounts. This meant that National Banks may retain deposits as long as a depositor desires to leave it in bank. That is inconsistent with the Kentucky theory that every owner who leaves his deposit dormant for ten or twenty-five years (as the case may be) has "presumably abandoned" it; and the State has the right to take it.¹⁰

If the States have power to remove the so-called dormant deposits from the National Banks, they may, by their own further extension of that power, destroy the power of National Banks to receive and keep deposits; and thereby prevent them from obtaining the necessary funds for the future operation of National Banks.

¹⁰Of course, National Banks are subject to the application of ordinary legal proceedings determining the disposition of deposits upon the death of the depositor, or even his presumed death under State Statutes; but, in such cases, the proceedings must be the *ordinary judicial proceedings*, with the State, the bank, the personal representative or administrator of the depositor, and his heirs—all before the Court.

When a court, State or Federal, of competent jurisdiction, with the necessary parties before it, decrees the ownership of the deposit, then the bank will, and must, pay the deposit to the person thus "duly authorized" to receive it.

But that rule does not apply to a Legislative Act.

Opinion of the Kentucky Court of Appeals.

The Court of Appeals held that the *San Jose* case (262 U. S. 366) was not controlling, on the ground that the California Statutes were "statutes of *escheat* or confiscation," and thus tended "to frustrate the purposes and objects of national legislation with respect to such banks" (R. 62); *whereas*, it decided that the Kentucky Act "does not provide for an escheat of deposits by reason of mere dormancy, as did the California Statutes," but "vested in the State mere *custody* as distinguished from title" (R. 63); and hence had no tendency to cause depositors to hesitate to make deposits in national banks (*Id.*).

We reply:

This Court did not decide the *San Jose* case with reference to any "escheat" question (p. 28, *supra*) but solely as an interference with a Federal Instrumentality.

We are not here concerned with the rights and remedies of the California *depositors*, as compared with the Kentucky *depositors*. It is not merely a question whether the Act will cause *depositors* to hesitate to deposit their money in national banks. The point is that the Act takes away the *assets and business* of National Banks.

The National Bank must surrender to the State so much of its assets as equals the dormant deposit; and whether that transfer of property from the National Bank to the State is an *escheat*, or is a mere *vesting of custody* (as distinguished from title) makes no difference, so far as the condition of the National Bank is concerned. In each instance, it is deprived of the deposit and must pay the money to the State. The rights of the National Bank, and the effect upon the Bank, are the same in Kentucky as in California—in each instance an interference with a Federal instrumentality.

The Court of Appeals refused to follow the Supreme Court of Tennessee, or the Circuit Court of Appeals (6th),

p. 8, *supra*, because it thought those Courts failed to understand the ground of the *San Jose* decision (R. 63).

It remains for this Court to apply the principles controlling the *San Jose* case, the Tennessee case, and the Sixth Circuit case, to the far more objectionable Kentucky Act—and reach such conclusion as it deems proper.

THIRD POINT.

The Kentucky Act (K.R.S. §393.110), if enforced, will deprive both the State and National Banks of their property "without due process of law."

The petitioner, Anderson National Bank, is not asserting, relying upon, or fighting for, the rights of its depositors,¹⁷ nor is it concerned with whether its depositors are denied due process, "*except in so far as its rights are involved in those of the depositor*" (*Provident Savings Institution v. Malone*, 221 U. S. at p. 663). This exception is necessary, because a depositor (if unlawfully deprived of his deposit) may have a right of action against the Bank to recover the deposit, even though the Bank may have been previously compelled to surrender its money to the State, on which the Bank had relied to pay the depositor. (*Security Bank v. California*, 263 U. S. at p. 286).

The Bank is concerned only with the Statute's effect upon the property of State and National Banks.

I. If compelled (under heavy penalties) to surrender its dormant deposits to the State, *merely because the Act says so*, all Banks—State and National—are thereby deprived of their property "without due process of law." The mere fact that it is a *Legislative Act* which requires them to surrender their property does not constitute "due process."

If K. R. S. §393.110 automatically constitutes "due process," suppose the next Kentucky Legislature, instead

¹⁷See p. 5 note² 34, *supra*; *Security Bank v. California*, 263 U. S. at p. 286, 290.

of confining its activities to dormant accounts, should enact that all Banks should pay over to the State, and keep in its hands, 50% of the Bank's assets applicable to the payment of its deposits. Would that be "due process"?

Or, suppose the Act provided that the State should *take custody* (i. e., possession) of uncultivated farm lands, and unimproved city property, but *without taking title* thereto. That Act would certainly lack "due process," even if the owner were given the right to get his property back upon cultivating or improving it. A wrongful taking of property is never justified by permitting the owner to recover it later. A thief must surrender custody, if he is caught, and his willingness then to surrender the property does not justify the original taking. The test of "due process" is not whether the property can be *recovered*, but whether it was *rightfully taken* in the first place.

Any wrongful taking results in a duty to return that which was so taken. It is arguing in a circle to say that because there is a duty to return, the wrongful taking is excusable.

The Kentucky Act is in the nature of a "Bill of Pains and Penalties," in that it *confiscates* by Legislative enactment the property of all Banks; nor is it any less a *confiscation* because the Act unsuccessfully (p. 41-42, *infra*) attempts to *relieve* the Banks from liability to their depositors, or to "reimburse" the Banks if such relief is impossible.

In short, if, by a mere Legislative Act, States can *transfer* the custody of citizens' property to the State, upon the excuse that *title* is not transferred, all effective property protection is gone.

II. The States of Kentucky, Minnesota, Wisconsin, Michigan and California insist that the Kentucky Act does not deprive any of the Banks (State or National) of their property "without due process of law." They rely upon

(i) several State Court decisions¹⁸ and (ii) this Court's decisions in *Provident Savings Institution v. Malone*, 221 U. S. 660, and *Security Bank v. California*, 263 U. S. 282.

In the *Provident Savings Institution* case, the Massachusetts Attorney General sued the Bank, alleging that the depositors *could not be found*, and that no claimants to the deposits were known. The Bank was *served with process*. A citation, addressed to the depositors, was published weekly for three weeks in two Boston newspapers.

¹⁸See Kentucky's BRIEF, p. 19-41; *Amicus Curiae* BRIEFS: Minnesota p. 8-9; Michigan, p. 3, 4, 24; California, p. 2.

The State Court cases are easily disposed of:

(1) As to *National Banks*, they are inapplicable because they deal exclusively with the power of States over their own *domestic* corporations.

(2) As to *State Banks*, they are, for a variety of reasons, inapplicable:

In *Brooklyn Borough Gas Co. v. Bennett*, 277 N. Y. S. 203, 154 Misc. 196, a New York Act required public utilities to file with the Public Service Commission a report of all ten-year dormant consumer deposits; and to pay into the State Treasury all fifteen-year dormant consumer deposits, with a provision for an ultimate refund to the consumer if called for.

A public utility sued to enjoin the enforcement of the Act. A single trial judge denied the injunction, upon the authority of *Provident Savings Institution v. Malone*, 221 U. S. 660; but pointed out that the utility was entitled to a judicial hearing *before* it could be compelled to turn over the deposits to the State, saying (p. 216-217):

"In so far as the utility is concerned, none of these deposits can be taken from its possession without due notice and an opportunity for it to be heard. As a matter of fact the proceedings are initiated by the utility itself by the filing of the report with the Commission. In so far as a hearing is concerned, the utility itself is the arbiter as to what particular deposits are to be reported, so that the necessity of a formal hearing does not arise. If the report of the utility is unsatisfactory to the state, there is ample provision in the Public Service Law to compel compliance with the statute, and in this connection the orders of the Commission can be reviewed by the court, so that in all these respects due process is secured. Public Service Law, §§ 11, 22 and 66; *Matter of New York Cent. R. Co. v. Public Service Commission of State of New York*."

[Note continued on following page]

The Bank answered and admitted the allegations of the petition; but it attempted to defend on the ground that the *depositors* were deprived of their property without "due process of law."

This Court held that the Act required *general proceedings* to be instituted in the Probate Court; with personal notice to the Bank; with usual citation and notice to the depositor, if living, and to his heirs, if dead; with opportunity to appear and defend—which procedure was sufficient to keep the Statute from violating the Federal Constitution.

York, 238 N. Y. 132. **There must also be due process in so far as the depositor is concerned, for if the law is not valid as to such depositor it will furnish no protection to the utility when it parts with the deposit.** *Louisville & Nashville R. Co. v. Deer*, 200 U. S. 176; *Security Savings Bank v. California*, *supra*.

[After an historical review of property seizures]: Such practices indicate that seizure standing alone has never been regarded as due process, under the procedure of civil law as administered in England at the time we inherited it [Citations omitted]."

There was no appeal, as the Statute was changed.

The Kentucky Act takes possession *before* any judicial hearing.

In *Commonwealth v. Dollar Savings Bank*, 259 Pa. 138, all the dormant deposits were made *after* the passage of a statute which required 30-year old dormant deposits to be paid to the State. Pennsylvania sued the Bank to compel the payment of such deposits to the State. The Court held that the statute was "not an escheat act"; and that all the deposits were subsequent to, and hence subject to the terms of the statute.

In *State v. Security Savings Bank*, 186 Cal. 419, there were full judicial proceedings to enforce a statute requiring 20-year old dormant deposits to be paid to the State. Personal service was made on the Bank. The depositors were served by adequate constructive service of process, and a final judgment was entered compelling the payment to the State (affirmed in *Security Bank v. California*, 263 U. S. 282).

In *Braun v. McPherson*, 277 Mich. 396, by a four to three decision, it was held (1) that an official administrator of escheated estates, consisting of dormant deposits in an insolvent bank, might maintain an *action* to compel the receiver to pay the dividends on the deposits to such official administrator; and (2) that the depositors' failure to prove their claims against the bank's receiver, prevented the receiver from relying upon the depositors' forfeited rights.

That case is inapplicable here, because (1) Of the *difference* between the Massachusetts and Kentucky Statutes, the latter seizing the deposit even if the depositor is known, *whereas*, the Massachusetts Statute only applied "where the owner cannot be found"; (2) No judicial proceedings of any kind are required in Kentucky; and (3) No opportunity is afforded in Kentucky to either the Bank, or to its depositors, to assert (*before* the payment is made to the State) any *judicial defense* to the Act's peremptory requirement that the Bank must pay the deposits to the State.

In *Security Bank v. California*, 263 U. S. 282, the State of California sued both the Bank and certain depositors to compel the Bank to deposit with the State \$7,425.16 alleged twenty-year-old dormant deposits of such defendant-depositors. The Bank was served personally, and defended. The depositors were served by publication but none of them entered their appearance. The State Court entered judgment in favor of the State, and the Bank appealed. This Court held (1) That the California statute did not "effect an immediate escheat," but only provided for the State taking over the deposit *after judicial proceedings*, wherein the Bank was served personally and defended, and the depositors were served by publication; and that the statutory service was reasonable; (2) That all the judicial proceedings were in accordance with the usual California Civil Procedure; (3) That the judicial proceedings, the notice, and the opportunity to defend were sufficient; and (4) That the proceeding was not one *in personam* as to the depositors, and hence personal service on them was unnecessary; and (5) That whether the proceeding was *in rem* or *quasi in rem* was immaterial, as in either event the essential requirements were satisfied by the California procedure.

This Court thus stated the Security Bank's due process defense¹⁹ (p. 286):

¹⁹As foreshadowed in the *Provident Savings Institution* case, 221 U. S. at p. 63; *Cf.*, p. 35, *supra*.

"The bank's main contention is that it is denied due process because, owing to defects in the prescribed procedure, depositors will not be bound by the judgment; and, hence, that payment to the State will not discharge the bank from its liability to them."

The Security Bank's "due process" contention was overruled, because this Court held there were *no defects* in the prescribed procedure; that the depositors *would be bound* by the judgment; and that the bank's payment to the State *discharged the bank* from liability to the depositors (p. 286, 288 and cases there cited).

None of those conditions exist here: (1) There is no *judicial procedure* whatever, but a mere seizure; (2) The depositors are not bound by any judgment, because no judgment is rendered; and (3) The Bank's enforced payment to the State *will not discharge* the Bank's liability to its depositors.

The *Security Bank* case is no authority in support of the validity of the Kentucky Act; and this so because the California Act provided for *full judicial proceedings*, with personal and valid constructive *service of process*, and a final judgment, *before* the Bank had to pay the money to the State; *whereas*, the Kentucky Act *makes no provision* for (i) any judicial proceeding, or (ii) any personal service, or constructive service, of process in any kind of a judicial proceeding, or (iii) any judgment *before* the Bank is compelled to pay the money to the State.

III. The Attorney General of Kentucky suggests (BRIEF, p. 7, 40) that K: R. S., §393.130 (p. 5, *supra*) (1) *relieves* the Bank of any liability to its depositors; and (2) provides that the State shall *reimburse* the Bank, if the Bank cannot be relieved of its liability to the depositor; and, therefore, that "the Act does not deny due process of law" (BRIEF, p. 19).

That argument must be promptly rejected.

1. A mere Legislative Act cannot relieve the Banks of their contractual liability to their depositors, in the absence of judicial proceedings, to which the Bank and the depositors must be parties by personal or constructive service of process, and a judgment therein relieving the Bank. This is obviously so, because a State cannot relieve any of its citizens of the debts they owe.

The depositors might at any time draw checks against their accounts in the Bank; and if the Bank dishonored the checks, it would be liable in damages to the depositors for such dishonoring²⁰—especially so in the case of Savings Deposits, where the Banks owe, not only the face of the deposits, but all the *accumulated interest*; and the State has made no provision to pay such interest.

Even the Kentucky Legislature recognized the absurdity of attempting *legislatively* to relieve the Banks of the obligation of their deposit contracts; for it provided that the State would “reimburse” the Bank, if it could not be constitutionally relieved of its obligation to its depositors.

2. The provision that “the State shall reimburse” the Bank does not give the Bank any protection whatever.

(a) The Act does not confer upon the Banks any power to sue the State; nor does the State waive its immunity to suit.

(b) The Kentucky Constitution, §230, provides that:

“No money shall be drawn from the state treasury, except in pursuance of appropriations made by law.”

For “reimbursement” the Banks will be wholly dependent upon the vote of future Legislatures to make the neces-

²⁰The depositors will not go through the long, cumbersome process of trying to recover from the State, when they have ready at hand a valid remedy against the Bank, either (i) to have the checks paid, or (ii) to sue the Bank for breach of contract for not paying the checks.

sary appropriations to pay the Banks—a “far cry” from “reimbursement”; and a most flimsy asset for a Bank!

(c) Kentucky Constitution, §49, provides that the State's debt “shall not at any time exceed \$500,000; *except*, when authorized by a vote of the people at a general election (Ky. Const., §50).

\$500,000 is a very small authorized debt limit. If the State's other indebtedness, *plus* its reimbursement debt to the Banks or to the depositors, exceeded that amount, there would be no way for the Banks to be reimbursed, except by a vote of the people at a general election.

Consequently (if the State's total indebtedness exceeded \$500,000), no matter how willing the Legislature might be to reimburse the Banks, it could only do so after an authorization by a general election.

If this Court upholds the Kentucky Act, the National Banks and the State Banks will *owe* to their depositors the *full amount* of the dormant deposits, even *after* the Banks have paid the money to the State; but the Banks' cash assets will be correspondingly reduced. In place of cash, they will have these nebulous, questionable, non-negotiable claims against the State, the collection of which will have to depend upon future appropriations by the Legislature, and possibly by general elections by the people.

Does not the Kentucky Act, if enforced, take away from the State and National Banks their property “without due process of law”?

FOURTH POINT.

Response to the various Briefs filed in support of Kentucky's position.

The BRIEFS of the Attorney General of Kentucky, and the BRIEFS *Amicus Curiae* of the Attorney Generals of Minnesota, Wisconsin, Michigan, and California, insist as follows:

First: That First National Bank v. California, 262 U. S. 366, should be overruled for alleged inconsistency with the decisions cited in the margin.²¹

We reply:

First National Bank v. California involved interference with a *National Bank*, as a Federal instrumentality. All the alleged conflicting cases²¹ related to the power of a *State* over a *State Bank*. The difference is so obvious that argument is unnecessary.

Second: That the Escheat Act must be upheld because a number of cases have sustained Escheat Acts against State Banks, and, hence, the same rule should apply to a National Bank (BRIEFS: Attorney General of Kentucky, p. 19, 23; California, p. 6-8; Michigan, p. 14; Minnesota and Wisconsin, p. 8-9).

We reply;

1. The difference between the power of a State over *escheating* deposits in *State Banks*, and the power of a State *summarily to seize a National Bank's property* is too obvious for further argument.

²¹BRIEFS: Kentucky, p. 55; Minnesota and Wisconsin, p. 2-15; Michigan, p. 20; California, p. 2, 12:

Provident Savings Institution v. Malone, 221 U. S. 660; *Security Bank v. California*, 263 U. S. 282; *Brooklyn Borough Gas Co. v. Bennett*, 277 N. Y. S. 203; *Commonwealth v. Dollar Savings Bank*, 259 Pa. 138; *State v. Security Savings Bank*, 154 Pac. 1070; *Braun v. McPherson*, 277 Mich. 396.

2. In every case where the State has succeeded in compelling a Bank to pay dormant deposits to the State, there was first (before such payment could be compelled) a judicial proceeding, with personal service of process, or adequate constructive service of process, against the Bank and its depositors, pursuant to the State's general procedure; and a final judgment entered. No similar procedure is provided in the Kentucky Act; but the Bank must pay the money to the State and look to subsequent litigation for its protection.

CONCLUSION.

The Kentucky Court of Appeals should be reversed and K.R.S. §§393.110, 393.230, 393.290, 393.990 declared unconstitutional as to both State and National Banks.

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BULLITT & MIDDLETON,
Of Counsel.

January 18, 1944.

[See Appendix, p. 45, *infra*, for
all the Statutes involved.]

APPENDIX.

Kentucky Revised Statutes 1942.

Chapter 393; Escheats*.

393.010 [1605a; 1610] Construction of chapter.

(1) As used in this chapter, unless the context requires otherwise;

(a) "Claim" means to demand payment or surrender of property from the person whose duty it is to pay the claimant, or surrender to him the property involved;

(b) "Commissioner" means the Commissioner of Revenue;

(c) "Department" means the Department of Revenue; and

(d) "Person" means any individual, state or national bank, partnership, joint stock company, business, trust, association, corporation, or other form of business enterprise, including a receiver, trustee or liquidating agent.

(2) This chapter does not apply to bonds of counties, cities, school districts or other tax-levying subdivisions of this state.

*"An Act relating to all classes of property actually or presumptively subject to escheat; providing the terms upon which presumption of abandonment of property and presumption of the death of persons shall be determined; providing how and when said property may be escheated to the Commonwealth of Kentucky, providing for the reduction of all such property to cash, transferring the possession of same to the Treasurer of Kentucky; providing how any person who is legally entitled thereto may recover same from the Treasurer; providing that any person transferring property to the Commonwealth as required by this Act shall be relieved of liability to the owner thereof or reimbursed for any liability or damage incurred by complying with this Act; defining certain words; providing for reports and examination of records; providing for the administration and enforcement of this Act, and for an Assistant Attorney General as incident thereto; providing fines, penalties, and imprisonment for failure to comply with this Act; providing that if any provision of this Act shall be held unconstitutional that it is the Legislative intent that all other provisions thereof shall remain in force and effect; repealing sections 1610 to 1623, inclusive of Carroll's Kentucky Statutes, Baldwin's 1936 Revision; repealing all Acts and parts of Acts in conflict with this Act; repealing Chapter 168, Acts of the Regular Session of the 1938 General Assembly of the Commonwealth of Kentucky; and repealing, amending and re-enacting sections 1606, 1607, 1608, and 1609 of Carroll's Kentucky Statutes, Baldwin's 1936 Revision." [Kentucky Acts 1940, chapter 79, p. 333.]

393.020 [1606] Property subject to escheat.

If any property having a situs in this state has been devised or bequeathed to any person and is not claimed by that person or by his heirs, distributees or devisees within eight years after the death of the testator, or if the owner of any property having a situs in this state dies without heirs or distributees entitled to it and without disposing of it by will, it shall vest in the state, subject to all legal and equitable demands. Also, any property abandoned by the owner, except a perfect title to a corporeal hereditament, shall vest in the state, subject to all legal and equitable demands. Any property that vests in the state under this section shall be liquidated, and the proceeds, less costs, fees and expenses incidental to all legal proceedings of the liquidation shall be paid to the department.

393.030 [1607] Disposition of property subject to escheat.

(1) The personal representatives of a person, any part of whose property is not distributed by will, and who died without heirs or distributees entitled to it shall settle their accounts within one year after qualifying, and pay to the department the proceeds of all personal property, first deducting the proper legal liabilities of the estate.

(2) If the whole personal property cannot be settled and the accounts closed within one year, the settlement as far as practicable, shall then be made and the proceeds paid to the department, and the residue shall be settled and paid as soon thereafter as can be properly done.

(3) The personal representative shall take possession of the real property of the decedent not disposed of by his will, and rent it out from year to year until it is otherwise legally disposed of, and pay the net proceeds to the department.

(4) The personal representative shall also make out and transmit to the department a description of the quantity, quality, and estimated value of the real property and its probable annual profits.

393.040 [1608] Procedure if legacy or devise is not claimed.

If any devisee or legatee, or his heir, devisee or distributee, has failed for eight years to claim his legacy or devise, the personal representative of the testator, or other person possessing it shall, after deducting the legal liabilities thereon, pay and deliver it, and the net profits from it to the department.

393.050 [1609] Presumption of death after seven years; disposition of property.

When a person owning any property having a situs in this state is not known to be living for seven successive years, and neither he nor his heirs, devisees or distributees can be located or proved to have been living for seven successive years, he shall be presumed to have died without heirs, devisees or distributees, and his property shall be liquidated and the proceeds, less costs incident to the liquidation and any legal proceedings, and the liabilities which have been properly claimed and approved against it, shall be paid to the department.

393.060 [1610] Deposits in bank or trust company payable on demand; when presumed abandoned.

Any deposit, (legal, beneficial, equitable or otherwise) payable on demand in any bank or trust company in this state, together with the interest thereon shall be presumed abandoned unless the owner has, within ten successive years next preceding the date as of which reports are required by KRS 393.110:

(1) Negotiated in writing with the bank or trust company concerning it;

(2) Been credited with interest on the passbook or certificate of deposit on his request;

(3) Had a transfer, disposition of interest or other transaction noted of record in the books or records of the bank or trust company; or

(4) Increased or decreased the amount of the deposit.

393.070 [1610] Deposits not payable on demand; when presumed abandoned.

Any deposit (legal, beneficial, equitable or otherwise) other than those payable on demand in any bank or trust company in this state, together with the interest thereon, shall be presumed abandoned unless the owner has, within twenty-five successive years next preceding the date as of which reports are required by KRS 393.110:

(1) Negotiated in writing with the bank or trust company concerning it;

(2) Been credited with interest on the passbook or certificate of deposit on his request;

(3) Had a transfer, disposition of interest or other transaction noted of record in the books or records of the bank or trust company; or

(4) Increased or decreased the amount of the deposit.

393.080 [1610] Deposits for security; when presumed abandoned.

Any deposit of money, stocks, bonds or other credits made to secure payment for services rendered or to be rendered, or to guarantee the performance of services or duties, or to protect against damage or harm, and the increments thereof, shall be presumed abandoned unless claimed by the person entitled thereto within ten years after the occurrence of the event that would obligate the holder or depository to return it or its equivalent.

393.090 [1610] Intangible personal property held for another; benefits on any instrument; when presumed abandoned.

All dividends, stocks, bonds, money, credits and claims for money and credits, and all intangible personal property, and the increments of any of them, held in this state by any person for the benefit of another shall be presumed abandoned unless claimed by the beneficiary or person entitled thereto within ten years from the time the holder, trustee, debtor, or other responsible person became obli-

gated to return them or their equivalent to the proper owner or claimant. If the increments or benefits payable on any instrument are not claimed within the time prescribed in this section, the instrument or evidence of the debt or obligation shall likewise be presumed abandoned.

393.100 [1610] Property paid into court; when presumed abandoned.

Any property paid into any court of this state for distribution, and the increments thereof, shall be presumed abandoned if not claimed within five years after the date of payment into court, or as soon after the five-year period as all claims filed in connection with it have been disallowed or settled by the court.

393.110 [1611] Holders of abandoned property to report to department; posting of notices; duty to surrender property to department; rights of action.

(1) It shall be the duty of all state and national banks, trust companies, or other persons, and courts of this Commonwealth or the agents thereof, whether holding estates or property as bailee, depository, debtor, trustee, executor, liquidator, administrator, distributor, receiver or in any other capacity coming within the purview of Section 7 of this Act [KRS 393.010(2); 393.060 to 393.100], to report annually to the Department as of July 1, all property held by them declared by this Act to be presumed abandoned. The report shall be filed in the offices of the Department on or before September 1 of each year for the preceding July 1, and shall give the name of the owner, his last known address, the amount and kind of property, and such other information as the Department may require for the administration of this Act. The report shall be made in duplicate; the original shall be retained by the Department, and the copy shall be mailed to the sheriff of the county where the property is located or held. It shall be the duty of the sheriff to post said copy on the court house door or the court house bulletin board. The sheriff shall immediately certify in writing to the Department the date when said copy was posted. Said copy must

be posted on or before October 1 of the year when it is made, and shall be constructive notice to all interested parties and shall be in addition to any other notice provided by statute or existing as a matter of law.

(2) Any person who has made a report of any estate or property presumed abandoned, as required by this Act, shall, between November 1 and November 15 of each year, turn over to the Department all property so reported; but if the person making the report or the owner of the property shall certify to the Department by sworn statement that any or all of the statutory conditions necessary to create a presumption of abandonment no longer exist or never did exist, or shall certify the existence of any fact or circumstance which has a substantial tendency to rebut such presumption, then, the person reporting or holding the property shall not be required to turn the property over to the Department except on order of court. No person shall be required to surrender any property on a presumption of abandonment to the Department if the period of time provided by any statute of limitation applicable to the owner's rights as against the holder has expired unless the court orders him to do so. If a person files an action in court claiming any property which has been reported under the provisions of this Act, the person reporting or holding such property shall be under no duty while any such action is pending to turn the property over to the Department, but shall have the duty of notifying the Department of the pendency of such action.

(3) The person reporting or holding the property or any claimant thereof shall always have the right to a judicial determination of his rights under this Act and nothing therein shall be construed otherwise; and the Commonwealth may institute an action to recover such property as is presumed abandoned whether it has been reported or not and may include in one petition all such property within the jurisdiction of the court in which the action is brought provided the property of different persons is set out in separate paragraphs [1942, c. 156, §§ 1, 2; Eff. June 1, 1942].

393.120 [1612] Sale of abandoned property.

Any intangible personal property required by KRS 393.060 to 393.110 to be liquidated so as to permit payment to the department, shall be surrendered to the department and sold by it to the highest bidder at public sale at Frankfort, or in whatever city in the state affords, in its judgment, the most favorable market for the particular property involved. The department may decline the highest bid and reoffer the property for sale if it considers the price offered insufficient. The sale shall be advertised at least one week in advance in a newspaper of general bona fide circulation in the county where the property was found or abandoned, and in the county where the sale is to be made. The sale shall be held at the court house door.

393.130 [1613] Transferor to department relieved of liability.

Any person who transfers to the department property to which the state is entitled under this chapter shall be relieved of any liability to the owner arising from that transfer. The state shall reimburse any person who cannot be relieved of such liability by this section for all liability to the owner of the property or estate or damage incurred by reason of compliance with this chapter.

393.140 [1614] Claim of interest in property surrendered to state.

(1) Any person claiming an interest in any property paid or surrendered to the state in accordance with KRS 393.020 to 393.050 who was not actually served with notice, and who did not appear, and whose claim was not considered during the action or at the proceedings that resulted in its payment to the state, may, within five years after the judgment, file his claim to it with the department.

(2) Any person claiming an interest in any estate or property paid or surrendered to the state in accordance with KRS 393.060 to 393.120, that was not subsequently adjudged under the procedure set out in KRS 393.230 to have been actually abandoned, or owned by a decedent who had no

heir, distributee, devisee or other person entitled under the laws of this state relating to wills, descent and distribution to take the legal or equitable title, may file his claim to it at any time after it was paid to this state.

(3) The claimant shall, within fifteen days after filing any claim permitted under this section, publish notice of the claim in a newspaper of general bona fide circulation in the county in which the property was held before being transferred to the state. If there is no such newspaper, the claimant shall post the notice at the courthouse door and in three other conspicuous places in that county, and shall file proof of publication or posted notice with the department. No such claim shall be allowed until fifteen days after proof of the notice is received by the department at its offices in Frankfort.

"Bona fide circulation" defined, KRS 424.010.

393.150 [1615] Commissioner to determine claims.

The commissioner shall consider any claim or defense permitted to be filed before the department and hear evidence concerning it. If the claimant establishes his claim, the commissioner shall, when the time for appeal or further legal procedure has expired, authorize payment to him of a sum equal to the amount paid into the State Treasury in compliance with this chapter. The decision shall be in writing and shall state the substance of the evidence heard by the commissioner, if a transcript is not kept. The decision shall be a matter of public record.

393.160 [1615] Appeals from decision of commissioner.

Any person dissatisfied with the decision of the commissioner may, within sixty days, appeal from it to the Franklin circuit court or file an action in that court to vacate the decision. In either event the proceedings shall be de novo, and no transcript of the record before the commissioner shall be required to be kept unless requested by the claimant. In such proceeding the commissioner shall be made a party defendant, and all other persons required by law to be made parties in actions in rem or quasi in rem shall be made parties. Any party adversely affected by the decision of the Franklin circuit court may appeal to the

Court of Appeals within sixty days after the judgment. Upon an appeal the state shall not be required to make a supersedeas bond. The provisions of this section relating to the decision of the commissioner and appeals therefrom shall also apply to a decision of the commissioner rendered under authority of KRS 393.110.

393.170 [1616] Property in Federal custody; determination of whether escheat has occurred.

Whenever any property escheated under this chapter by reason of actual abandonment, or death or presumption of death of the owner without leaving any person entitled to take the legal or equitable title under the laws of this state relating to wills, or descent and distribution, has been deposited with, or in the custody or under the control of, any Federal court in and for any district in this state, or in the custody of any depository, clerk or other officer of such court, or has been surrendered by such court or its officers to the United States Treasury, the circuit court of any county in which such Federal court sits shall have jurisdiction to ascertain whether an escheat has occurred, and to enter a judgment of escheat in favor of the state. This section does not authorize a judgment to require such courts, officers, agents or depositories to pay or surrender funds to this state on a presumption of abandonment as provided in KRS 393.060 to 393.110.

393.180 [1618] Proceedings instituted by county attorney on relation of commissioner.

Any legal proceeding to enforce KRS 393.020 to 393.050 and to recover any sum due the state thereunder shall be instituted, on the relation of the commissioner, by the county attorney of the county in which any such property is located. The petition and all necessary pleadings shall be sent to the commissioner for his signature and approval. The petition shall be accompanied by an affidavit of the county attorney, stating the facts on which it is based. For all other pleadings, there shall be a statement by the county attorney of the reason for the particular pleading.

393.190 [1618] Assistant Attorney-General to aid county attorney.

On any action filed by a county attorney under the provisions of this chapter, the assistant Attorney-General provided for in KRS 15.140 shall offer assistance and suggestions to the county attorney in the preparation of the petition or any pleadings, and revise and correct them as he considers necessary, subject to the ultimate approval of the commissioner, when he is required to sign them.

393.200 [1618] Compensation of county attorney; commissioner may perform his duties.

If the county attorney performs all the duties imposed upon him by this chapter relating to enforcement of KRS 393.020 to 393.050 he shall be entitled to a fee of fifteen-percent of any sum recovered in the proceeding, but shall be limited to five percent on intangible property recovered in excess of one thousand dollars. If the county attorney declines to perform the duties imposed upon him by this chapter, they may be performed by the commissioner, and the county attorney shall not be entitled to any fee. When he considers it to the best interest of the state, the commissioner may institute any action authorized by this chapter to be brought by the county attorney, or join the county attorney in the active prosecution of any such action. The county attorney shall be entitled to his fee in either instance if he does his duty.

Assistant Attorney-General assigned to Department of Revenue, KRS 15.140.

393.210 [1618] Property in two or more counties; compensation of county attorneys.

If the property of a person coming within the purview of KRS 393.020 to 393.050 is located in two or more counties, all the property may be included in one action. The county attorneys of all counties in which such property is located may join in the prosecution of the proceeding. Their fees shall be determined by the amount of money derived from the property located within their respective counties when

possible to determine that figure. Otherwise, the courts shall determine their fees by equitable apportionment in accordance with the value of the property located in their respective counties.

393.220 [1618] Disposition of tangible property during proceeding.

Pending the outcome of an action, the court may make such disposition of the land or tangible personal property involved as it considers best from the standpoints of use, rents, interest and profits. If the use of the property is given to the claimant by the court, he shall be held accountable for returns and profits arising from it if the state is successful in the proceeding.

393.230 [1619] Proceeding to force payment of intangible property; to establish actual abandonment.

(1) If any person or the agent of any court refuses to pay or surrender intangible property to the department as provided in KRS 393.060 to 393.110, an equitable proceeding may be brought on the relation of the commissioner to force payment or surrender. All property subject to KRS 393.060 to 393.110 may be listed and included in a single action.

(2) If any intangible property is turned over to the department on presumption of abandonment, in accordance with KRS 393.060 to 393.120, the commissioner may at any subsequent time institute proceedings to establish conclusively that it was actually abandoned, or that the owner has died and there is no person entitled to it.

393.240 [1619] Actions may be joined; shall be in equity.

(1) If any person has property coming within the purview of KRS 393.020 to 393.050, and also of KRS 393.060 to 393.110, the actions required to be brought by the county attorney and the commissioner may be joined, but joinder is not required, and if separate actions are brought, they shall not be considered as coming within the rule against splitting a cause of action. The county attorney is not charged with

the duty of enforcing sections KRS 393.060 to 393.120, 393.150 or 393.160.

(2) The procedure for all actions under this chapter shall be filed as equity actions and follow the procedure provided by the Civil Code of Practice, unless otherwise provided in this chapter.

393.250 [1620] Expenses, how paid; county attorney to collect judgments, deduct fee.

(1) Any necessary expense required to be paid by the state in administering and enforcing this chapter shall be paid out of appropriations made to the department.

(2) The county attorney shall act as agent of the department for the collection of all judgments recovered in actions prosecuted by him under this chapter. He shall deduct the fee allowed him and promptly remit the remainder to the department with such information relating thereto as the department requires.

393.260 [1621] Limitation of State's action.

Any action brought by the state under this chapter shall be brought within fifteen years from June 12, 1940 or from the time when the cause of action accrued, whichever is the later date.

393.270 [1622] Person under disability, extension.

Any person under disability affected by this chapter shall have five years after the disability is removed in which to take any action or procedure or make any defense allowed to one sui juris.

393.280 [1622-1] Examination of records; promulgation of rules; delegation of commissioner's authority.

(1) The department, through its employees, may examine all records of any person where there is reason to believe that there has been or is a failure to report property that should be reported under this chapter.

(2) The commissioner may promulgate any reasonable and necessary rules for the enforcement of this chapter, and govern hearings held before him. He may delegate in writing to any regular employe of the department authority to perform any of the duties imposed on him by this chapter, except the promulgation of rules.

393.290 [1622-1] Civil action to enforce production of reports, surrender of property.

(1) The department may require the production of reports, or the surrender of property as provided in this chapter by civil action, including an action in the nature of a bill of discovery, in which case the defendant shall pay a penalty equal to ten percent of all amounts that he is ultimately required to surrender. This penalty shall not exceed five hundred dollars.

(2) Any person who in good faith contests the applicability of this chapter to him may be relieved of the threat of any penalty by posting a compliance bond in an amount and of surety sufficient to the court.

393.300 [1623-1] Restriction on escheat of real property held by lending corporation under supervision.

No person shall institute proceedings to escheat real property the title to which was acquired by any lending corporation in satisfaction of debts previously contracted in the course of its business, or that it purchases under a judgment for any such debt in its favor, if such pending corporation is under the supervision of the Division of Banking of this state, Comptroller of Currency of the United States or any other duly constituted supervising banking authority, state or Federal, without first obtaining the consent of the supervising authority having supervision over that corporation.

393.990 [1622-1] Penalties.

Any person who refuses to make any report as required by this chapter shall be fined not less than fifty dollars nor more than two hundred dollars, or imprisoned for not less than thirty days nor more than six months, or both.

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DEC 8 1943

CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1943

No. 154

ANDERSON NATIONAL BANK, Suing on Behalf of
Itself and All Others Similarly Situated, - - Appellants,

vs.

H. CLYDE REEVES, Individually and as Commis-
sioner of Revenue of the State of Kentucky, Etc.,
Et AL, - - - - - Appellees.

Appeal from the Court of Appeals of
the State of Kentucky

BRIEF FOR APPELLEES

HUBERT MEREDITH,
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✓ A E. FUNK,
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Supreme Court of the United States

October Term, 1943

No. 154

ANDERSON NATIONAL BANK, Suing on BE-
HALF OF ITSELF AND ALL OTHERS SIMILARLY
SITUATED, - - - - - *Appellants,*

vs. BRIEF FOR APPELLEES

H. CLYDE REEVES, INDIVIDUALLY AND AS COMMIS-
SIONER OF REVENUE OF THE STATE OF KEN-
TUCKY, ETC., ET AL., - - - - - *Appellees.*

APPEAL FROM THE COURT OF APPEALS OF
THE STATE OF KENTUCKY.

STATEMENT OF THE CASE

This case comes before this court on an appeal from a judgment of the Kentucky Court of Appeals affirming a final judgment of the Franklin Circuit Court holding that appellants were not entitled to an order or decree enjoining respondents from enforcing certain parts of Chapter 79 of the Kentucky Acts, 1940, as amended by Chapter 156 of the Kentucky Acts, 1942¹. It was appellants' contention that said parts of the Act² were unconstitutional.

The Kentucky Court of Appeals rendered two opinions in the case which are reported in 293 Ky. 735, 170 S. W. (2d) 350 and 294 Ky. 674, 172 S. W. (2d) 575. The second opinion merely affirms the first.

¹ Sections 393.010 to 393.990, inclusive, Kentucky Revised Statutes.

² This Act will be referred to hereinafter as "the Act."

No question is raised on this appeal as to the validity of sections 3, 4, 5 and 6³ of the Act or the provisions of other sections of the Act in so far as they apply only to said sections 3, 4, 5 and 6⁴. These unquestionably valid parts of the Act are referred to herein because some knowledge of them is essential to a full understanding of the controversy in this case.

They provide in substance that the state may take a *defeasible title* to property under the following circumstances: (1) Death of the owner intestate without heirs; (2) failure of a devisee or the heir or distributee of a devisee to claim a legacy within eight years after death of the devisee;⁵ (3) actual abandonment of property by the owner;⁶ (4) presumption of death without heirs or devisees or distributees where the owner of property "is not known to be living for seven (7) successive years, and neither said owner, his heirs, devisees, or distributees can be located or proved to have been living for seven (7) successive years. . . ."

³ Sections 393.020, 393.030, 393.040 and 393.050, Kentucky Revised Statutes.

⁴ See the first two paragraphs of the opinion of the Kentucky Court of Appeals [170 S. W. (2d.) 350]. Appellants attempted to assail the validity of the above provisions in their petition, but admittedly abandoned in the Franklin Circuit Court, before the case even reached the Court of Appeals, any contention that said provisions were invalid.

⁵ Grounds 1 and 2 were held valid in *Commonwealth v. Schult*, 268 Ky. 806, 105 S. W. (2d) 1067; *Commonwealth v. Unknown Heirs of Haynes*, 188 Ky. 256, 221 S. W. 541; *Louisville School Board v. Chicago, St. Louis & N. O. R. R. Co.*, 124 Ky. 497, 99 S. W. 596; *Bank of Louisville v. Board of Trustees*, 83 Ky. 219; *Commonwealth v. Blanton's Executors*, 41 Ky. (2 B: Monroe) 393. Ground 1 first appeared in the Kentucky Statutes in Chapter 86, Acts of the General Assembly (1839-40). Ground 2 first appeared in an amendment in 1854 of the Acts of 1842. (See General Statutes, Kentucky, 1873. Ch. 36, p. 404.)

⁶ Ground 3 was not in the 1936 edition of Ky. Stats. For definition of "actual abandonment" see *Stinett v. Kinslow*, 238 Ky. 812, 39 S. W. (2d) 1006; *Rice v. Rice*, 243 Ky. 827, 50 S. W. (2d) 26.

⁷ Ground 4 was held valid in *Commonwealth v. Thomas' Adm'r.*, 140 Ky. 789, 131 S. W. 797; *Louisville School Board v. Bank of Ky.*, 86 Ky. 150, 5 S. W. 739. This provision is amendatory of an Act of 1884 and was enacted substantially in its present form in 1893. (See sec. 1609, Ky. Stats., 1936 edition.)

The state can never take property on any of the above grounds except pursuant to a court judgment obtained in accordance with the Civil Code of Practice. Even when property is so taken, "any person claiming an interest therein, and who was not actually served with notice and did not appear in the proceedings, may within five (5) years after the judgment file his claim to recover same with the Department of Revenue." Anderson National Bank v. Reeves, 293 Ky. 735, 170 S. W. (2d) 350. See KRS⁶ 393.140.*

Thus on any of the above grounds, the state takes title to the property subject to defeasance at any time within five (5) years.

Other sections of the Act provide that particular classes of property under certain circumstances are presumed abandoned and provide a procedure whereby the state takes custody only (not title) of such property to conserve same forever for the benefit of anyone having an interest therein. It is the validity of some of these provisions relative to property presumed abandoned which is brought into question on this appeal. The true import of these provisions must be ascertained for they, in reality, constitute the facts on which this litigation is based. We believe that the Kentucky Court of Appeals has in its opinion clearly stated and construed the provisions of the Act, but, we do not agree with the construction placed on the court's opinion on the Act in appellants' assignment of errors. The basic provisions of the Act as we see them may be summarized as follows:

A. Section 7⁹ of the Act sets out all the grounds and circumstances which give rise to a presumption that any property is abandoned. It provides:

*No contention is made by appellants that the Kentucky Civil Code of Practice denies due process of law.

⁶Sections 393.060 to 393.100, inclusive, K.R.S.

(1) That where the owner of bank deposits *payable on demand* have not for ten (10) successive years next preceding the date for making reports as required by the Act (a) negotiated in writing with the bank or trust company in respect thereto, or (b) been credited with interest on the passbook, or certificate of deposit, on his request, or (c) had a transfer, distribution of interest, or other transaction noted of record in the books or records of such bank or trust company, or (d) increased or decreased the amount of deposit, such deposits and the interest thereon shall be presumed abandoned.

(2) That a presumption of abandonment also arises with respect to deposits *not payable on demand* on the same grounds set out in (1) above, except that the period of time is twenty-five (25) successive years instead of ten (10).

(3) That all moneys, stocks, bonds, or other credits deposited to secure payment for services rendered or to be rendered, or to guarantee the performance of services or duties, or to protect against damage or harm, are presumed abandoned unless claimed by the person entitled thereto within ten (10) years after the occurrence of such event as would obligate the holder or depository to return the same or the equivalent thereof to the proper owner or claimant.¹⁰

(4) That all intangible property held within this state by any person for the benefit of another person shall be presumed abandoned unless claimed by the beneficiary or person entitled thereto within ten (10) years from the time the holder, trustee, debtor, or other responsible person be-

¹⁰ Deposits made with utility companies to guarantee payment of service are a good example of the class of property covered by this provision. *

*came obligated to return the same or the equivalent thereof to the proper owner or claimant.*¹¹

(5) That when any estate or property is paid into any court of this Commonwealth for distribution, it is presumed abandoned if not claimed within five (5) years after same was paid into the court or as soon after said five-year period as all pending claims shall have been closed or settled by the court.

B. Section 8¹² of the Act, as amended in 1942 by Chapter 156, Acts of 1942, provides in substance as follows:

That all persons holding property declared by the Act to be presumed abandoned must report same to the Department of Revenue annually as of July 1. The report is due on or before September 1 of each year and must be made in duplicate. The copy must be posted on the courthouse door or bulletin board on or before October 1 of each year. The Act expressly provides that said publication "shall be constructive notice to all interested parties and shall be in addition to any other notice provided by statute or existing as a matter of law." The person reporting the property is required to turn it over to the Department of Revenue between November 1 and November 15 of each year except that "if the person making the report or the owner of the property shall certify to the Department by sworn statement that any or all of the statutory conditions necessary to create a presumption of abandonment no longer exist or never did exist or shall certify the existence of any fact or circumstance which has a substantial tendency to rebut such presumption, then, the person reporting or holding the property shall not be required to turn the property over to the Department except on order of court. No person shall be required to surrender any property on

¹¹ This section covers dry trusts, bailments and pledges where the property is not claimed within ten (10) years after its true owner was entitled to a return thereof. It does not apply to the ordinary creditor-debtor relationship, because the debtor is not holding property for the benefit of any person; nor does it apply to any active trust, pledge, or bailment.

¹² Section 393.110 K.R.S.

a presumption of abandonment to the Department if the period of time provided by any statute of limitation applicable to the owner's rights as against the holder has expired unless the court orders him to do so. . . . The person reporting or holding the property or any claimant thereof shall always have the right to a judicial determination of his rights under this Act and nothing therein shall be construed otherwise; and the Commonwealth may institute an action to recover such property as is presumed abandoned whether it has been reported or not and may include in one petition all such property within the jurisdiction of the court in which the action is brought provided the property of different persons is set out in separate paragraphs."

C. Section 17¹³ of the Act provides:

That all money received by the Department of Revenue under the provisions of the Act must be deposited with the State Treasurer and credited to the account of the General Expenditure Fund.¹⁴

D. Section 11¹⁵ of the Act provides:

That any person claiming an interest in any property turned over to the State on the ground that it was presumed abandoned may claim it "at any time after same was paid to this Commonwealth." Thus, there is absolutely no time limit on the filing of a claim for a refund of property presumed abandoned.

E. Section 12¹⁶ of the Act provides:

That if a claimant establishes his right to property presumed abandoned, the Commissioner of Revenue must authorize payment to him of a sum "equal to the same

¹³ Section 393.250 K.R.S.

¹⁴ The Act provided that 10% of such sum as is paid to the State Treasury for the fiscal years beginning July 1, 1940, and July 1, 1941, should be added to the appropriation of the Department of Revenue. This provision can never take effect because the time when it would have been effective has expired, and the provision has been eliminated in K.R.S.

¹⁵ Section 393.140 K.R.S.

¹⁶ Sections 393.150, 393.160 K.R.S.

amount which was paid into the State Treasury in compliance with this Act." Any person dissatisfied with the decision of the Commissioner has two alternatives: (1) he may within sixty (60) days appeal to the Franklin Circuit Court, or (2) he may within sixty (60) days file an action in said court to vacate such decision. In either event the proceedings are *de novo*. Any party adversely affected by the decision of the Franklin Circuit Court may appeal to the Kentucky Court of Appeals.

F. Section 10¹⁷ of the Act provides as follows:

"Any person who shall transfer to the Department of Revenue, property to which the Commonwealth is entitled under the provisions of this Act, is hereby relieved of any liability to the owner of such property arising from such transfer; however, if any such person cannot be relieved of such liability by the provisions of this section, the Commonwealth shall reimburse such person for all liability to the owner of the property or estate or damage incurred by reason of compliance with the provisions of this Act."

G. Sections 14, 15, and 16¹⁸ of the Act set out the procedure for enforcing all the terms of the Act. The procedure for enforcing sections 3, 4, 5, and 6¹⁹ of the Act is entirely different from the procedure for enforcing the sections of the Act which relate to property presumed abandoned.²⁰ The county attorney has duties to perform with respect to the enforcement of sections 3, 4, 5, and 6, and receives a fee for his services. However, he has no duties with respect to sections 7 and 8,²¹ which relate to property presumed abandoned. No fees are allowed to anyone in connection with property presumed abandoned, and no

¹⁷ Section 393.130, K.R.S.

¹⁸ Sections 15.140, 393.180, 393.190, 393.200, 393.210, 393.220, 393.230 and 393.240, K.R.S.

¹⁹ Sections 393.020, 393.030, 393.040 and 393.050, K.R.S.

²⁰ It will be remembered that sections 3, 4, 5, and 6 of the Act set out the grounds which entitle the state to a defeasible title. Such title must be established by court procedure, except perhaps in rare instances not here material. See cases cited at page 2 hereof.

²¹ Sections 393.060 to 393.110, K.R.S.

costs or expenses or other amounts are deducted from any property voluntarily turned over to the State on a presumption of abandonment. The last paragraph of section 16²² of the Act provides: "*The procedure for any and all actions or proceedings permitted or necessary under this Act to be filed in a court of competent jurisdiction shall be the same as that now provided in Carroll's Kentucky Civil Code of Practice, unless provided differently herein, except that all such actions or proceedings shall be filed as equity actions.*"

The provisions of the Act relative to bank deposits presumed abandoned are the ones most violently assailed in appellants' petition and brief. Their petition is replete with lengthy *distorted* statements of the provisions of the Act, conclusions of law and even questions. It is more in the nature of a brief than a petition. Actually, the petition fails to allege that the appellants have any property coming within the terms of the Act. The nearest appellants come to making such an allegation appears at pages 10 and 11 of the printed record where it is stated "Plaintiff and each of those for whom it sues have deposits and or other property that *would or might* come within the terms of the Act." Plainly, all appellants said in this statement was that they "*might*" have property coming within the terms of the Act. Even if they had affirmatively alleged that they did have such property, the allegation would have been a mere conclusion. They should have alleged the facts (if any) which bring their property within the terms of the Act. Although respondents (defendants below) filed a general demurrer to this petition, they, in their brief in the Kentucky Court of Appeals, waived the demurrer to a *limited extent* by stating that they were willing to treat the petition as if facts had been stated therein sufficient to show that appellants held *both types of bank deposits* declared by the Act to be presumed abandoned. But for

²² Sections 393.230 and 393.240, K. R. S.

this waiver, the Kentucky Court of Appeals would most probably have sustained the demurrer.

Because of this faulty petition and because of appellants' failure in their brief to discuss the validity of the provisions of the Act relative to any class of property presumed abandoned other than bank deposits, we do not believe that the validity of any provisions of this Act is in issue except those relating to bank deposits *presumed abandoned*.

We find no argument in appellants' brief dealing specifically with any class of property other than bank deposits. *For example*, appellants advance no argument to the effect that the State of Kentucky may not under this Act take custody of money paid into one of its courts for distribution when such money has remained unclaimed for five (5) years. *The fact that the officers of the court have, at least presumptively, exhausted all of the court processes for finding the owner of or a claimant to such property* obviously distinguishes the due process question relative to such property from the due process question relative to bank deposits. Similar distinctions can be made with respect to other classes of property presumed abandoned. But, *since appellants do not in their argument discuss with any particularity any class of property except bank deposits*, we doubt that we should do so. It is fundamental that this Court will not consider an assignment of error even where it appears in the record if it is not mentioned in the argument. *Southeastern Express Company v. Miller* and *Southeastern Express Company v. Roberts*, 264 U. S. 541, 68 L. ed. 840. Furthermore, the Act is presumed valid in every detail, and appellants have the burden of showing that it is not. We have no desire to dodge any argument or issue in the case, but we do want to confine the brief to the real issues involved. We shall, therefore, direct our argument primarily to the proposition whether the pro-

visions of the Act dealing with dormant bank deposits²³ are constitutional.²⁴ The answer to this proposition will, in final analysis, turn entirely on two questions of law, viz: (1) Whether said provisions of the Act deny due process of law and (2) whether said provisions are applicable to national banks.

HISTORY OF THE PROCEEDINGS BELOW

The appellants, plaintiffs below, Anderson National Bank of Lawrenceburg, Kentucky, Suing on Behalf of Itself and All Others Similarly Situated, alleged in their petition that Chapter 79, Acts of the General Assembly of 1940, is unconstitutional in its entirety and sought a permanent and perpetual injunction enjoining the appellees from enforcing the Act. Respondents, defendants below, filed a motion to strike large portions of the petition. The motion was sustained, and thereafter respondents filed a general demurrer to the petition. The demurrer was overruled, respondents excepted and filed an answer to which appellants demurred.

When the cause came on for hearing on the demurrer, the court expressed the opinion that the part of the Act which dealt with property "*presumed abandoned*" *denied due process of law to the owners (not the holders) of such property solely for the reason that it failed to provide sufficient notice to such owners.* The court, therefore, held only said part of the Act unconstitutional, and permanently enjoined appellees from enforcing same. The court's

²³ Bank deposits of the character described in section 7 of the Act (393.060, K.R.S.) for the sake of brevity are referred to hereinafter as dormant bank deposits.

²⁴ However, we do not urge that the issue be limited as above set out. We take no exception to appellants' attacking the validity of any provision of the Act, whether they technically have the right to do so or not, because we sincerely believe that the Act is constitutional in its entirety and respondents have no desire to enforce any provision thereof which is for any reason unconstitutional. But we do think we are within our rights in insisting that appellants first present an argument to the effect that a substantive provision of the Act is invalid before we are required to present any argument in support of its validity.

order granting said injunction was entered January 30, 1942, the last day of the January term of the Franklin Circuit Court.

In March 1942, the legislature amended section 8²⁵ of the 1940 Act *which dealt with notice*. This section formerly required persons holding property presumed abandoned to make a single report thereof to the State, and did not require a copy of the report to be posted anywhere. The section as amended requires that the report be made in duplicate and that the copy be posted on the courthouse door or bulletin board of the county where the property is located. Another provision in section 8²⁵ as amended which was not in the 1940 Act is that *the State can bring an action to recover property presumed abandoned irrespective of whether it has been reported or not, and can include in one action all such property within the jurisdiction of the court in which the action is brought, provided the property of different owners is set out in separate paragraphs*.....

After the amendment, Respondents, without conceding that the 1940 Act was ever unconstitutional in any respect, moved the Franklin Circuit Court to dissolve the aforesaid order of January 30, 1942, for the reason that the amendment had removed the constitutional objection which that court found to the 1940 Act. Appellees also filed an amended answer to which appellants filed a general demurrer.

On May 30, 1942, the Franklin Circuit Court, *being of the opinion that the part of the amendment which authorized the collective suit was constitutional, and that the part of the Act, which requires a voluntary delivery of the property to the State in the absence of the affidavit mentioned in section 8²⁵ thereof, was unconstitutional solely because the Act, even as amended, did not provide that adequate notice be given the owners of the property*, entered an order setting aside the order of January 30,

²⁵ Section 393.110, K.R.S.

1942, and permanently enjoined defendants from insisting on or accepting a voluntary delivery of property presumed abandoned without first filing a suit and procuring a court order for delivery thereof. *At the same time the court declined to enjoin appellees from requiring appellants to make reports of property presumed abandoned, and also declined to enjoin defendants from filing suits, as provided in the Act, to recover property presumed abandoned, whether reported or not.*

Appellants excepted to the judgment on three grounds, viz: (1) That the Act, if valid, could not apply to deposits made before the effective date of the Act; (2) that deposits in national banks could not be taken on a presumption of abandonment; and (3) that appellants and those for whom they sued could not be required to file the report provided for in section 8²⁶ of the Act. These exceptions were the basis for appellants' appeal to the Kentucky Court of Appeals.

Respondents excepted to the judgment in so far as it held any part of the Act unconstitutional or enjoined the enforcement of any part thereof, and took a cross-appeal to the Kentucky Court of Appeals.

The Kentucky Court of Appeals reversed the lower court on the cross-appeal, affirmed the lower court on the appeal, and issued its mandate accordingly. The lower court (the Franklin Circuit Court) entered its judgment in accordance with the mandate of the Kentucky Court of Appeals. A perfunctory appeal was taken from that judgment to the Court of Appeals, and it was affirmed by that court in *Anderson National Bank v. Reeves*, 294 Ky. 674, 172 S. W. (2d) 575. This appeal is prosecuted from that judgment.

²⁶ Section 293.110, K.R.S.

APPELLANTS ASSIGNMENTS OF ERROR DISCUSSED

Beginning at page 92 of the printed record, appellants set out eleven (11) assignments of error which are repetitions and overlapping to a high degree, and, *in our judgment, show that appellants have in some material respects misconstrued the opinion of the Kentucky Court of Appeals.*

In several of the assignments of error the court is charged with making certain holdings which it seems not to have made at all. For example, in appellants' 4th assignment of error, it is charged that the court erred "in holding that said statutes, as construed by the Court of Appeals as requiring all persons in Kentucky who hold personal property for the benefit of another, and which has been unclaimed for a period of ten years must, under heavy penalty, voluntarily turn over such property to the Department of Revenue without suit, notice or judicial (fol. 173) decree, are not violative of the due process clause of the 14th Amendment of the Constitution of the United States."²⁷ We find no support in either the opinion of the court or the Act for the assertion made in the assignment of error. What the appellants probably have in mind is the provision in the Act to the effect that where property is held for the benefit of another and is not claimed within ten (10) years *after the person for whom it is held became entitled to a return of the property or the equivalent thereof, it is presumed abandoned.* Obviously, this provision relates to the corpus of dry trusts, but said assignment of error indicates that the court held it applied to the corpus of active trusts. This is a very significant difference.

In several of the assignments of error, it is stated that the Kentucky Court of Appeals held that the State of Ken-

²⁷ See also the 1st assignment of error for a repetition of this charge.

tucky could "take or *escheat* deposits in banks on account of inactivity." The court really held that the State cannot under any circumstances *escheat* a deposit in either a state or national bank on the ground of *mere inactivity or dormancy* and that it cannot *escheat* property on any ground without judicial proceedings. In this connection the court said:

"Since the act in controversy does not provide for an escheat of deposits by reason of *mere dormancy*,²⁸ as did the California statutes, (title being vested in the state only after judicial determination of actual abandonment) and since the depositor may at any time before actual abandonment is adjudged (and five years thereafter if he was not served with actual notice) secure a return of his deposit from the state, it is our opinion that the Act has no tendency to cause depositors to hesitate on account of apprehended fear of confiscation to make deposits in national banks. This being true, there is no unwarranted interference with such banks, and no frustration of the purpose of national legislation concerning them such as to render the Act invalid as to them."

It is also implied in several of the assignments of error that the court held that the State of Kentucky could take custody of property presumed abandoned without any notice to the owner. What the court actually held was that the Act did not deny due process of law, and from the cases cited in support of the holding, it is clear that the court was convinced that the owner of such property had adequate constructive notice for the taking of custody of his property. These cases show that such owner has not merely one adequate notice but several. Thus it appears that the answer to several of appellants' assignments of error is that they are predicated on a misconstruction of the written opinion of the Kentucky Court of Appeals.

²⁸ Court's emphasis.

SUMMARY OF ARGUMENT

Due Process

Our argument on due process may be summarized as follows:

(1) Dormancy or inactivity of property in the sense that there has been no act of ownership over it for a long period of time constitutes reasonable grounds to support legislation designed to make some disposition of such property in the interest of the general welfare.²⁹

(2) There is no material deprivation of property under the provisions of the Act in controversy and, therefore, the due process clause is not even involved.

(3) But, if there is a deprivation, it is slight and the owner of the property has notice adequate to satisfy the due process clause of the Fourteenth Amendment for the following reasons:

(a) The proceeding is in rem and seizure of the res is notice;

(b) The statutes themselves are constructive notice and afford a reasonable opportunity for a hearing because they are entirely prospective in their effects;

(c) Seizure of the res and the prospectiveness of the statutes conjointly satisfy due process even if one of them standing alone is insufficient;

(d) The copy of the report of property presumed abandoned must be posted on the courthouse door at least one (1) month before any property is required to be delivered voluntarily to the state. Such voluntary delivery is required only in the absence of the affidavit described in section 8³⁰ of the Act. Hence the owner of any property presumed abandoned has at least one (1) month after the notice is posted in which to make a simple, inexpensive affidavit which will take his property completely without the purview of the Act. The antiquity of this form of notice

²⁹ This appears to be admitted by appellants.

³⁰ Section 203.110, R.S.

in statutes of this character in Kentucky also supports its adequacy.

(4) Although the Kentucky Court of Appeals held that the publication on the courthouse door was not necessary to satisfy the due process clause, it did not hold that the notice should not be posted as required by the Act. Therefore, it *must* be given; and this court, if it should be of a mind to overrule the Kentucky Court of Appeals on this particular holding, should determine the adequacy of this courthouse door publication *under all the circumstances of the case.*

(5) If the court should conclude that there is a material deprivation of property when it is voluntarily delivered to the state under this Act and that none or all of the notices set out in (2) above satisfy due process, then, the banks or other holders of property presumed abandoned would not be relieved of the obligation to report the property. They would merely be relieved of the duty to deliver it voluntarily to the state *when the affidavit mentioned in section 8³¹ of the Act is not made.* The banks or holders of such property would still be subject to the court action authorized by section 8³¹ of the Act to establish *by court judgment* the state's right to take *custody only* of property on the grounds of dormaney set out in section 7³² of the Act.³³ It is provided that this action must be pursuant to the Kentucky Civil Code of Practice and there is no intimation in appellants' brief or assignments of error that this Code procedure does not meet all tests of due process. Hence, on the pleadings and record, the farthestest this court could go in the way of a decision adverse to respondents on the due process question would be to hold that the Kentucky Court of Appeals erroneously upheld the valid-

³¹ Section 393.110, K.R.S.

³² Section 393.060, K.R.S.

³³ This ground should not be confused with such grounds as death intestate without heirs or actual abandonment on which a defeasible title is taken pursuant to a court judgment procured in accordance with the Kentucky Civil Code of Practice and over which there is no question of validity.

ity of the requirement of the Act for a voluntary delivery of property presumed abandoned. Such a holding would merely mean, so far as concerns the due process question, that the Court of Appeals erred in reversing the Franklin Circuit Court on the cross-appeal.

(6) A judicial determination is not an indispensable requirement of due process. All that is required is a reasonable opportunity to be heard.

(7) A bank depositor has more protection under this Act when his deposit is delivered to the state voluntarily than when it is delivered pursuant to a court judgment. Hence, a judicial determination that a deposit is dormant would serve no useful purpose.

The National Bank Question

(1) This court said in effect in the *San Jose* case that the California statutes attempted to confiscate deposits solely on the ground of dormancy and that they might have the effect of causing people to hesitate to place deposits in national banks where they would be subject to possible confiscation. The Kentucky statutes *conserve* deposits on the ground of dormancy instead of *confiscating* them on said ground. Therefore, the Kentucky Statutes will not have the same adverse effect on national banks which was attributed to the California statutes.

(2) It was on the basis of this distinction that the Kentucky Statutes were held valid by the Kentucky Court of Appeals. It will be our contention that this is a sound distinction of great legal significance and that the judgment of the Kentucky Court of Appeals should be affirmed. At least, we feel confident that because of this distinction, the *San Jose* case will not be considered by this court to be conclusive of the case at bar.

(3) Although it is not essential to a decision on this appeal favorable to respondents that the *San Jose* case be overruled, it will be suggested in argument that the

case should be overruled because the adverse effect which this court said the California statutes would have on national banks is insubstantial and too speculative in the light of more recent decisions of this court dealing with the general question of intergovernmental immunities to constitute a sound basis for holding the California Statutes invalid.

ARGUMENT

The Act Does Not Deny Due Process of Law

In *Provident Institution for Savings v. Malone*, 221 U. S. 660, 55 L. ed. 899, this court considered the validity of a Massachusetts statute, the substance of which was in the language of the court as follows:

“ . . . That deposits in savings banks which had remained inactive and unclaimed for thirty years, and where the claimant was unknown or the depositor could not be found, should be paid to the treasurer and receiver general.

“ . . . Before the money can be turned over to the receiver general, proceedings must be instituted in the probate court, and, under the decision of the supreme court of the state, personal notice must be given to the bank, and citation and notice, usual in the probate court, published, so as to give the depositor, if living, and his heirs, if dead, opportunity to appear and be heard. Even then the property is not escheated, but deposited with the treasurer, to hold as trustee for the owner or his legal representatives, to whom it is payable when they establish their right.”

This court held that the statute did not deny due process of law or impair the obligation of contracts. The reasons for the court's conclusion are concisely set out in the following statement from the opinion:

“ . . . Savings banks are maintained, in the expectation that the deposits may, for years, remain uncalled for, to the mutual advantage of bank and customer. So that, if the statute had provided that the money should be paid over to the receiver general if the owner, after a short absence, could not be found, or if the account remained inactive for a brief period, a very different question would be presented from that arising under an act which deals with absence and non-action so long continued as to suggest that the law of escheats or of lost property might be enforced. This, however, is not a statute of escheats, since it does not proceed on the theory that the depositor is dead, leav-

ing no heirs. It does not purport to dispose of lost property, but deals with a deposit the owner of which, though known, cannot be found. *The Act is like those which provide for the appointment of custodians for the real and personal property of an absentee.*

"In this case, though the money is on deposit with a bank, which has faithfully kept its contract, yet the statute proceeds on the general principle that corporations may become involved, or may be dissolved; or that, after long lapses of time, changes may occur which would require someone to look after the rights of the depositor. The statute deals with accounts of an absent owner, who has so long failed to exercise any act of ownership as to raise the presumption that he has abandoned his property. And if abandoned, it should be preserved until he or his representative appears to claim it; or, failing that, until it should be escheated to the state. The right and power so to legislate is undoubted."

In *Security Savings Bank v. California*, 263 U. S. 282, 68 L. ed. 301 (hereinafter referred to as the *Security Savings Bank* case), this court held valid as to state banks certain California statutes, the substantive provisions of which were, in the language of the court, as follows:

"If a bank account has not been added to or drawn upon by the depositor for more than twenty years, and no one claiming the money has, within that period, filed with the bank any notice showing his present residence, and the president or managing officer of the bank does not know that the depositor is alive, then the bank shall, upon entry of a judgment establishing these facts, deposit with the state treasurer the amount of the deposit and accumulations. The suit cannot be begun until after the expiration of the twenty years. The statute does not affect an immediate escheat upon the lapse of the twenty years. It provides for taking over the deposit when so adjudged in the action. A valid claim to a deposit, duly made at any time prior to entry of the judgment, prevents its transfer to the state."

This court stated the reason for its holding as follows:

“Where the procedure is appropriate, neither the due process clause nor any right of the bank under the contract clause is violated by a law requiring it to pay over to the state, as depositary, saving deposits which have long remained unclaimed. . . . The contract of deposit does not give the bank a tontine right to retain the money in the event that it is not called for by the depositor. It gives the bank merely the right to use the depositor’s money until called for by him or some other person duly authorized. If the deposit is turned over to the state in obedience to a valid law, the obligation of the bank to the depositor is discharged. . . . It is no concern of the bank’s whether the state receives the money merely as a depositary or takes it as an escheat.”

In the face of the above decisions, appellants do not argue that the grounds set out in section 7³⁴ of this Act are not sufficient to support a presumption of abandonment. Their contention is that the procedure by which bank deposits are required to be voluntarily delivered to the state is defective, and therefore denies due process. They say the procedure is defective because the depositor is deprived of his deposits without notice, hearing or judicial decree. Respondents contend that the depositor is not even deprived of any property, but that if he is, he has several notices sufficient to satisfy due process, that he has a reasonable opportunity to be heard, and that his rights are better protected under a voluntary delivery of the deposit to the state than they would be if they were delivered pursuant to a court judgment.

Although the procedure under the Kentucky Act is not the same as that provided in the California statutes involved in the *Security Savings Bank* case, the holding in that case tends strongly to support the validity of the procedure outlined in the Kentucky Act. Under the California statutes the Attorney General is authorized to bring a suit in *Sacramento County* to establish the grounds of

³⁴ Section 393.060 to 393.100, inclusive, K.R.S.

dormancy on which the state takes the deposits. Personal service is made upon the bank.³⁵ Service upon the depositors is made by publication of the summons for four weeks in a newspaper of general circulation *published in Sacramento county*.³⁶ The main contention in the case was that the California statutes denied due process because of defects in the prescribed procedure. The bank argued that:

1. "If the proceeding is in personam, the law is invalid as to nonresidents of the state, since they are served only by publication; and it is invalid as to residents, because they are served by publication without a prior showing of the necessity for such service."
2. "If the proceeding is quasi in rem, the law is invalid as to all depositors and claimants, because there is no seizure of the res, or its equivalent; because the notice provided for is inadequate and unreasonable; and because it is binding only on parties to the action."
3. "If the proceeding is strictly in rem, the law is invalid, because it does not provide for such seizure of the res, nor give reasonable notice to depositors and claimants."

The court's answer to contention 1 was:

"The proceeding is not one in personam—at least, not so far as concerns the depositor,"

and that under the circumstances no prior showing of the necessity for notice by publication was necessary. The court further held that publication of notice in a newspaper having general circulation in Sacramento County instead of in a newspaper having general circulation in the

³⁵ Under the Kentucky Act, personal service upon the bank is not necessary because the banks initiate the proceedings by making a report of such property. The banks do not contend in this case that they do not have adequate notice.

³⁶ It should be observed that publication of notice is not required in the bank where the deposit is located or the place where the depositor resides.

county in which the bank was located, was, under the circumstances, adequate constructive notice.

The court's answer to contentions 2 and 3 was:

"But whether the proceedings should be described as being in rem or as being quasi in rem is not of legal significance in this connection. In either case the essentials of jurisdiction over the deposits are that there be seizure of the res at the commencement of the suit; and reasonable notice and opportunity to be heard. These requirements are satisfied by the procedure prescribed in the statutes of California. There is a seizure or its equivalent.

"Seizure of the deposit is effected by the personal service made upon the bank."

The deposit is likewise effectively seized under the Kentucky Act when it is reported by the bank because at that time the bank becomes obligated to hold the deposit for the state unless the affidavit referred to in section 8³⁷ of the Act is made. Hence, the *Security Savings Bank* case clearly supports the validity of the Kentucky Act.

It is also clear from the aforesaid Supreme Court decisions that a state may take, pursuant to judicial proceedings, on constructive notice, either custody of, or a defeasible title to deposits in state banks on the sole ground that they have been dormant or inactive in the sense that there has been no act of ownership relative to them for a long period of time.³⁸

There is also good authority to the effect that mere custody of deposits may be taken by a state from motives of public policy without judicial proceedings and without notice by publication. *Brooklyn Borough Gas Co. v. Bennett*, 277 N. Y. S. 203; *Commonwealth v. Dollar Savings Bank*, 259 P. 138, 1 A. L. R. 1048; *State v. Security Savings*

³⁷ Section 393.110, K.R.S.

³⁸ It has recently been held that absolute title cannot be taken on such ground without judicial proceedings. *State v. Phoenix Savings Bank & Trust Co.*, — Ariz. —, 132 P. (2d) 637.

Bank, 154 Pac. 1070, (annotated in 1 A. L. R. 1054 at 1056); *Braun v. McPherson*, 277 Mich. 396, 269 N. W. 211. Also see *Coler v. Corn Exchange Bank*, 250 N. Y. 136, 65 A. L. R. 879; affirmed in *Corn Exchange Bank v. Coler*, 280 U. S. 218, 65 L. ed. 403; *Commercial Trust Co. v. Miller*, 262 U. S. 51, 67 L. ed. 858. However, these cases may not hold that the property can be taken without any form of constructive notice. We find no decisions of this court to the contrary.

In *Brooklyn Borough Gas Company v. Bennett*, *supra*, there was in issue the validity of a statute which required public utility companies to turn over to the state deposits made by consumers to guarantee payment for service rendered when such deposits were not claimed within ten years after the service ceased. The statute did not require any judicial proceedings or publication of any notice before delivery of the deposits to the state. However, the owners of the deposits were entitled to claim them from the state without any limitation of time. The court held the statute valid and on the question of due process said:

"Though notice by publication as well as seizure is necessary in rem to make a sentence in such proceeding binding on the whole world, such sentence is one which usually affects ownership by transferring or extinguishing rights or interest in or to the thing subject to the jurisdiction. Where, however, title or ownership is unaffected and custody only is involved a different situation is presented. It is one thing to have jurisdiction to take the custody of property and another to have jurisdiction to hear and determine a sentence. Seizure before publication justifies taking the custody of the res and preserving it, but notice by some other method must supplement seizure before sentence or condemnation."

In *State v. Security Savings Bank*, *supra*, the court considered the validity of a statute which required banks to deliver to the state treasury deposits over which there had been no act of ownership for twenty years. The statute required no publication of notice or court proceedings.

but, as construed by the court, allowed the owners of the deposits to claim them from the state at any time before they were finally disposed of by a subsequent proceeding taken upon notice. It was contended that this statute denied due process of law. The court held the statute valid and on this contention said:

"In the consideration of this question it is to be noted at the outset that the section of the Bank Act under review does not contemplate any change in the ownership of the funds in question. It purports to deal with possession only, and to leave the matter of their ultimate ownership to be determined by such subsequent proceedings as are provided through the reference in the section to the provisions of section 1234 of the Code of Civil Procedure. . . . Reading section 15 of the Bank Act as a whole it must be evident that its only purpose and effect in providing for the summary taking over of unclaimed deposits by the state treasurer is to merely work a temporary change in their possession until such time as they may be claimed by their owners, or as the more ample procedure for their ultimate disposition outlined in section 1234, Code of Civil Procedure, can be set in motion; or, in other words, to place such unclaimed deposits in custodia legis until their ownership can be adjudicated by a proceeding taken upon such notice to all concerned as would amount to due process of law, and thus render the adjudication as to the ultimate control and ownership of the property in question binding upon all persons interested.

"... When the state, from motives of public policy, enacts a law providing that private property may be summarily seized and temporarily sequestered to await the inception or determination of a more formal proceeding affecting the title and ownership of the property so taken, neither the immediate possessor nor the actual owner can be heard to urge the objection that the summary seizure of the property by properly constituted public authorities has been accomplished without such notice as would constitute due process of law. . . .

"... It is difficult to see what useful purpose and

nothing authorizes on the part of the state or its officers to take away these deposits to the treasury without assent, than that which has already been given by the terms of the statute, and acted upon by the respondent in making its contract deposits in accordance therewith."

In *Commonwealth v. Dallas Savings Bank*, supra, there was in issue the validity of a statute which authorized the state to take possession of dormant bank deposits, and allowed the owners thereof an unlimited time in which to recover them from the state. The statute did not require any court proceedings or publication of notice. The court held that it was valid on the question of due process and:

"This is neither depriving the depositor of his property nor taking it for public use within the meaning of either the Federal or State Constitution."

"While, in operation of the Act of 1872, some credit of action against the depositor is taken away, yet this is no substantial deprivation to the owner of the deposit, for instead of that right as soon as the money is turned over to the state treasurer, he is afforded an action against the Commonwealth and provided with a court in which without limitation of time he may prove his claim. Since the state, with its power of taxation is always solvent, it would be impossible to give better security."

"When, as here, such property is taken in charge by the state and the owner or his legal representative are given an unlimited right to reclaim within notice of all unappropriated moneys in the public treasury, so far as may be necessary to repay the amount thereof when duly proved, this is simply a exercise of authority over property actually within jurisdiction of the state and liable to seizure for the protection of all parties in interest, including the owner, and is thus some mitigation or security for him, and is within the meaning of the constitutional provision relied upon in this case."

"Since the proceedings on the part of the state to obtain possession of these deposits were not instituted for the purpose of depriving an individual

it is expressly stated that there is no deprivation of property within the meaning of the constitution when the state, from motives of public policy, takes custody or possession only of dormant, unclaimed bank deposits or similar property to conserve it for the benefit of the owner. Do the courts mean by this or similar expressions that there is no deprivation or do they mean merely that the deprivation is not unconstitutional? Of course, if there is no deprivation, no notice is required under the due process clause, for that clause only applies when there is a deprivation.

At least, *all* these state court cases stress the fact that the deprivation, *if any*, is slight and that seizure of the res alone is adequate constructive notice *in view of the object and extent of the deprivation*. There can be little doubt that they are sound in this respect because, if, as was held in the *Security Savings Bank* case, seizure of the res is notice sufficient to sustain a transfer of a *defeasible title* to dormant bank deposits, it stands to reason that seizure of the res is sufficient to sustain a mere transfer of *custody*. This is not a new principle of law enunciated in these cases; they merely apply an old principle which is the very foundation of all in rem proceedings. See *Den Murray & Kayser v. The Hoboken Land & Improvement Co.*, 59 U. S. 272, 15 L. ed. 372; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565 at 570; *Public Clearing House v. Cope*, 194 U. S. 492, 48 L. ed. 1092; *Samuels v. McCurdy*, 267 U. S. 188, 69 L. ed. 568; *The Mary S Cranch* 388, 3 L. ed. 123 at 141; *Hollingsworth v. Barbour*, 4 Peters 466, 7 L. ed. 463 at 474; *Coler v. Corn Exchange Bank*, 250 N. Y. 136, 65 A. L. R. 879, affirmed in *Corn Exchange Bank v. Coler*, 280 U. S. 218.

The New York Court, in *Coler v. Corn Exchange Bank*, *supra*, (65 A. L. R. 879 at 885), held valid a statute which authorized public officers to seize without service of notice the bank deposits of an absconding husband for the

benefit of his family. Speaking through Justice Cardozo, the court said with reference to *seizure of bank deposits*:

"Seizure of the deposit at the instance of a public officer was warning to the owner that a proceeding was begun."⁴⁰

This Court stated, in *Pennoyer v. Neff, supra*, cited with approval in the *Security Savings Bank* case at page 570 of the Law Edition, as follows:

"... The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners; or, when the public is a party, to condemn and appropriate it for a public purpose. *In other words, such service may answer in all actions which are substantially proceedings in rem.*"

This Court stated, in *Hollingsworth v. Barbour, supra*, at page 926 of the Law Edition, as follows:

"... the law regards the seizure of the thing as constructive notice to the whole world, and all persons concerned in interest are considered as affected by this constructive notice."

This Court stated, in *The Mary, supra*, at page 684 of the Law Edition, as follows:

"... Where these proceedings are against the person, notice is served personally, or by publication; where they are in rem, notice is served upon the thing itself. This is necessarily notice to all those who have any interest in the thing, and is reasonable because it

⁴⁰ We especially recommend this case and the *Brooklyn Gas* case to this court for reading in full.

is necessary, and because it is the part of common prudence for all those who have any interest in it, to guard that interest by persons who are in a situation to protect it. Every person, therefore, who could assert any title to The Mary, has constructive notice of her seizure, and may fairly be considered as a party to the libel."

Thus, it is clear that the aforesaid state court decisions in holding that seizure of the res is adequate notice are fully in accord with the decisions of this court generally relating to in rem proceedings.

It is also indicated in some of these state court decisions that seizure of the res is not the only adequate notice which the owner of property presumed abandoned has but that the Act itself is adequate constructive notice to him. See *State v. Security Savings Bank, supra*, and *Commonwealth v. Dollar Savings Bank, supra*. This principle was also recognized in *Coler v. Corn Exchange Bank, supra*, wherein the court, speaking through Justice Cardozo, said:

"... If there was need of other warning to supply him with an opportunity for a hearing, it was given by the statute. The statute told him, a resident of the state, that the proceeding would come on for hearing at the next term of the County Court. This might be adequate notice or inadequate according to the circumstances. ... If the term next appointed gave a reasonable opportunity to the owner to appear and defend, he is not aggrieved though in other circumstances the time might be too short. The burden is on the defendant to show that notice was inadequate."

It is the prospectiveness of the Act, plus the fact that the owner is presumed to be familiar with its provisions, which makes it adequate notice. Any person having knowledge of the Act knows that he may, by exercising any of several simple remedies available to him, preclude the Act from affecting his property in any way. Any bank depositor is presumed to know that if his deposit is allowed

to become dormant in the manner set out in section 7¹¹ of the Act, the bank will be required to report it to the state. He knows that any written transaction between the bank and himself relative to the deposit will take it completely without the purview of the Act. Numerous written transactions can be made without changing the status of the deposit in any way. This is the most simple, inexpensive remedy one can imagine. Even after the report is made, he has at least *sixty days* (60) in which to mail the affidavit described in section 8¹² of the Act, to the state, and this affidavit will preclude delivery of the property to the state. What more simple, inexpensive remedy can the depositor have than this?

The time for pursuing these remedies is more than adequate. The Act became effective June 12, 1940. The report was not due until September 1, 1940, and delivery of the property was not due until November 1, 1940. Hence, the owner of a deposit which would be reportable during that year had from June 12, 1940, to November 1, 1940, to pursue one of these remedies. For years subsequent to the effective date of the Act, the owner of such deposits would have the time necessary to give rise to the presumption of abandonment in which to make a transaction in writing which would take them out of the statute. For example, if the statute provides that a deposit dormant for twenty years is presumed abandoned, the owner of a deposit nineteen (19) years dormant at the effective date of the Act has one (1) year in which to act, and the owner of a deposit fifteen (15) years dormant on that date has (5) years.

Having knowledge of the provisions of the Act, the depositor may, in lieu of following any one of the remedies suggested above, resort to more expensive court proceed-

¹¹ Sections 393.060 to 393.100, inclusive, K.R.S.

¹² Section 393.110, K.R.S.

ings to obtain the same result, or he may let the state take the property and recover it from the state.

We are unable to find any logical reason for saying that the Act itself is not notice to a depositor who has knowledge of the existence of the deposit. The Act is also adequate notice whether a depositor has knowledge of the existence of the deposit or not, because it affords him, by reason of the posted notice on the courthouse door, a convenient means of ascertaining the existence of the deposit. 39 *Am. Jur.* 238, *sec. 12*; 39 *Am. Jur.* 235, *sec. 5*. If, however, the principle that the Act is notice, does not for any reason apply when the owner has no knowledge of the existence of the deposit, the Act certainly does not deny due process. In that event, the need and reason for the state's taking custody of the property to conserve it for him becomes a circumstance of such great significance that seizure of the res and the posting of the notice on the courthouse door surely would be adequate constructive notice.¹⁵

It is inconceivable that such depositor would raise his voice against this Act, or contend that he is being deprived of his property thereby, or that seizure of the res and the notice posted on the courthouse door are, *under such circumstances*, inadequate to satisfy due process. In fact, such depositor is already, as a practical matter, deprived of his property and will continue to be deprived thereof unless this Act effects a restitution.

Although the Kentucky Court of Appeals held that said notice on the courthouse door was not essential to the validity of the Act; it did not hold that said notice should not be given, as directed by the Act. It must, therefore, be given and we submit that, if this court should not agree with this conclusion of the Kentucky Court of Appeals, the question whether this courthouse door notice is ade-

¹⁵ See *Ballard v. Hunter* (204 U. S. 241) and other cases cited at page 34 hereof.

quate to satisfy due process, becomes a matter for this Court to decide.

Because of this courthouse door notice, the Kentucky Act is much stronger from a due process standpoint than any of the statutes considered in *Brooklyn Borough Gas Company v. Bennett*, *supra*; *Commonwealth v. Dollar Savings Bank*, *supra*; *State v. Security Savings Bank*, *supra*; *Braun v. McPherson*, *supra*; *Coler v. Corn Exchange Bank*, *supra*; *Corn Exchange Bank v. Coler*, *supra*. As we have seen, taking of custody of property under the statutes involved in those cases was upheld even though there was no posting or publication of notice.

The existence of KRS 287.410⁴ which requires newspaper publication of bank deposits five (5) years dormant was no doubt one of the reasons why the legislature selected the courthouse door notice in preference to some other form of notice.

If said section is complied with, ten (10) notices by newspaper publication must be issued in respect to a deposit payable on demand, and forty (40) such notices in respect to a deposit not payable on demand, before such deposits would even come within the purview of the Act under consideration. Thus, if the banks have performed their mandatory duty under said section, depositors have had more than ample notice by newspaper publication and it would have been unduly duplicative had the legislature required in this Act another newspaper publication. If, on the other hand, the banks have generally failed to com-

⁴ KRS 287.410 provides:

"Every bank organized under this article or doing business under any law of this State, shall annually, in January, publish, in at least two issues of a newspaper published in the county in which the bank is located, a statement, under oath of its cashier, of all deposits made with it, and of all dividends and interest declared, and payable by it, which, at the date of such statement, shall have remained unclaimed by any person authorized to receive the same for five years, giving the time when, and the name of the person by whom the deposit was made, and the name of the person in whose favor the dividend or interest was declared, and when and from what source derived."

ply with said section, then, such failure was a circumstance which should have persuaded the legislature that some other form of publication would be more effective. Hence, no matter what the status of KRS 287.410 may be from the standpoint of whether it has been complied with or not, the legislature had good reason to provide for a different form of notice in this Act.

The following circumstances weigh heavily in favor of the adequacy of this courthouse door notice:

1. Said notice is non-expensive and results in no diminution of the property of the owner, and is, for that reason, in harmony with the primary object of the Act to preserve *all* the property; whereas, newspaper advertising is so expensive that good policy would require that it be passed on to the property owner, and would, therefore, result in a diminution of the property sought to be preserved. See *Dohany v. Rogers*, *infra*; *Jacobs v. Roberts*, *infra*; *Ballard v. Hunter*, *infra*; 12 C. J. 1232, sec. 1006.
2. Said notice is an ancient form of notice and was used in the very earliest escheat statutes of this State. This courthouse door notice is a well recognized and commonly used form of notice. 39 Am. Jur. 251, sec. 31; 2 A. L. R. 1008. It was employed in the very earliest escheat statutes of the State of Kentucky, at least as early as 1842. See *Revised Statutes of Kentucky of 1852*, p. 458, ch. 31. The fact that a form of notice or remedy is ancient is always an important factor in favor of its validity so far as concerns due process. *Corn Exchange Bank v. Coler*, *supra*; *Owben v. Morgan*, 256 U. S. 94, 65 L. ed. 837, 17 A. L. R. 873.
3. To have required further newspaper publication would have resulted, to a considerable extent, in a duplication of a valid subsisting statute (KRS 287.410) which the legislature is entitled to presume will be respected, whether it has been complied with or not.

4. The taking of property (if, indeed, any taking there be) is negligible.

5. The Act is a police measure and not subject to as rigid a due process test as might otherwise be the case.

6. *The Act itself puts all persons on notice of the time when and the place where the copy of the report will be posted, and thereby greatly increases the chances that any person interested in such property will be on the lookout for the same. This fact alone distinguishes this particular notice from notices usually given by publication in connection with court proceedings, and should establish the adequacy of the notice.* Statutes generally do not notify the owner of property when a proceeding in rem will be brought or what the nature of the proceeding will be. In other words, the owner must run the risk that he will by chance see any publications which are issued. But under this Act there is no such risk, for if the property owner is vigilant he can always go to the proper place at the proper time and obtain full information, or he can write the proper state department and procure the desired information. This is true because the Act fully and timely apprises the owner of the nature of the annual proceedings under the Act, and of the time and place where they will be commenced, and when the courthouse door posting of the report will be made.

The legislature of Kentucky, recognizing that other notices exist and considering all the circumstances, has expressly declared that said notice "shall be constructive notice to all interested parties and shall be in addition to any other notice provided by statute or existing as a matter of law." This provision is constitutional if, *all the circumstances being considered*, the legislature had any reasonable basis for it. Appellants have a burden of showing that no such basis exists (*Coler v. Corn Exchange Bank, supra*), but they have not made any attempt to do so. They just say that it is inadequate without giving any reason for their conclusion.

We again emphasize the fact that this court held in the *Security Savings Bank* case that newspaper publication in the capital city of the State of California was sufficient notice to authorize that state to take a defeasible title to bank deposits located anywhere in the state. In reaching that conclusion, the court gave considerable weight to the fact that California had a statute very similar to KRS 287.410.

It is logical to assume, as a general proposition, that the posting on the courthouse door or bulletin board required by the Kentucky Act would be more likely to come to the attention of interested parties than publication in a local newspaper in Frankfort, Kentucky, the state capital. This is true because such posting is made in the county where the property is located and where the depositor, his relatives, and his friends are more likely to be. It would be drawing the line of distinction rather fine to say that the State of Kentucky can take a defeasible title to a bank deposit located in the remotest county of the state by publication of a notice in a Frankfort paper; but that it can not take mere custody of such deposit by posting a notice on the courthouse door in said county pursuant to a statute which notifies the depositor and everyone else of the time when and the place where the publication will be made. We do not believe that this court will draw any such distinction. In fact, we think the notice provided in this Act for the taking of the mere possession of property is more likely to be seen by the property owner than is the notice provided in the California statutes for taking a defeasible title to property, which was held adequate in the *Security Savings Bank* case. Thus, it appears that that case alone is sufficient to overcome appellants' contention that the Act denies due process.

In deciding any due process question, it is fundamental that this court will take into consideration the object of the taking of property, the extent thereof, and all the other circumstances of the case. *Dohany v. Rogers*.

281 U. S. 362, 74 L. ed. 904; *Jacob v. Roberts*, 223 U. S. 261, 56 L. ed. 429; *Ballard v. Hunter*, 204 U. S. 241, 51 L. ed. 461; 12 C. J. 1232, *sec.* 1006.

In *Ballard v. Hunter*, *supra*, this court said:

"In passing upon the other contentions of plaintiffs in error, we are brought to the consideration of what is due process of law. A precise definition has never been attempted. It does not always mean proceedings in court. *Den ex dem. Murray v. Hoboken Land & Impro. Co.*, 18 How. 272, 15 L. ed. 372; *McMillen v. Anderson*, 95 U. S. 37, 24 L. ed. 335. *Its fundamental requirement is an opportunity for a hearing and defense, but no fixed procedure is demanded.* The process or proceedings may be adapted to the nature of the case. *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Lent v. Tillson*, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Iowa R. Co. v. Iowa*, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344.

"In *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616, a proposition was laid down which has since been quoted many times. The court said, at pages 104 and 105, L. ed. on pages 619 and 620: 'That whenever, by the laws of a state or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.' And Mr. Justice Bradley, in a concurring opinion, said, on pages 107 and 108, L. ed. on pages 620 and 621, 'that, in judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power

of eminent domain, or the power of assessment for local improvements, or none of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law,' but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.' Such an examination may be made without interfering with that large discretion which every legislative power has of making wide modifications in the forms of procedure in each case, according as the laws, habits, customs, and preferences of the people of the particular state may require."

Applying the above test of due process, this court has frequently held that, *under certain circumstances*, the "object or cause" of the taking may be such that property can be utterly destroyed without any notice to the owner. See *Miller v. Schoene*, 276 U. S. 272, 72 L. ed. 568; *Sentell v. New Orleans & Carrollton R. R. Co.*, 166 U. S. 698, 41 L. ed. 1169; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385.

The state court decisions cited by the Kentucky Court of Appeals in its opinion appearing in 293 Ky. 735, *supra*, as sustaining its conclusion that the Kentucky Act does not deny due process, placed great emphasis on the fact that the *cause or object* of the taking of property under the statutes involved in those cases was to conserve the property and that the deprivation, if any, was slight. Thus, it appears that those cases are in accord with the numerous decisions of this court dealing generally with the due process clause of the Federal Constitution. *The soundness of these cases and other cases relied on in this brief is manifested by the fact that appellants have not in the Kentucky Court of Appeals or in this court at any time attempted in their briefs to assail the reasoning of those cases.* Appellants merely say, without citation of authority, that a bank deposit may not be taken without a judicial determination. It is fundamental that due process only requires that a property owner be given a rea-

reasonable opportunity for a hearing and defense and that no fixed procedure is necessary. See *Ballard v. Hunter, supra*. That such opportunity is given under this Act with respect to property voluntarily delivered to the state, we summarize below some of the remedies available to both the depositor and the bank:

1. A bank depositor may write a note to the bank requesting it not to report the deposit. This is a written transaction in respect to the deposit, which would remove it entirely from the purview of the Act. Such transaction leaves the deposit *status quo*, so the depositor suffers absolutely no loss or expense. He may obtain the same result by other transactions in respect to the deposit.

2. Even after the property has been reported, any property owner may preclude its delivery to the state by making a simple affidavit.

3. Even after the property is delivered to the state, the owner can get it *all back*.

4. The owner can *bona fide* decline to deliver the property and force the state to sue for custody thereof.

5. Aside from the above remedies, the owner or the person reporting the property may resort to the courts for injunctive relief. This, alone, is sufficient to satisfy due process. *Commonwealth v. Hargis Bank & Trust Co.*, 233 Ky. 801, 26 S. W. (2d) 1045; *Willis v. Lafayette-Phoenix Garage Co.*, 202 Ky. 554, 260 S. W. 364; *Samuels v. McCurdy*, 267 U. S. 188, 69 L. ed. 568. He can also decline to make delivery of the property in the manner provided in section 20⁴⁵ of the Act.

6. If the bank or holder of the property turns it over to the state under a mistake of fact, the depositor or owner would, as a matter of law, have all the rights against the bank or holder that he ever had, and in addition, would, under the terms of the Act, have a right to recover the

⁴⁵ Section 393.290, K.R.S.

property *in toto* from the state. He would have no rights against the bank after an erroneous court adjudication that the deposit is dormant. Therefore, he has more protection when property is voluntarily delivered to the state than when it is delivered pursuant to a court judgment.

7. The bank or holder of the property may recover from the state any loss or damage which it may suffer by compliance with the Act. This is expressly provided in section 10⁶⁶ of the Act. Furthermore, if a bank were required to reimburse a depositor for any deposit it had turned over to the state, it would, on the doctrine of subrogation, succeed to any right of the owner against the state.

These remedies are not only adequate but appear to us to be about the best that can be designed; at least, they meet all tests of due process. See *Dohany v. Rogers*, 281 U. S. 362, 74 L. ed. 904; *Ballard v. Hunter*, 204 U. S. 241, 51 L. ed. 461. Why, in view of these remedies, is a judicial proceeding necessary to determine that a deposit is dormant? Such determination could serve no useful purpose whatever, but it would result in expenditures and court costs when the very purpose of the Act is to conserve property. If, however, for some reason unknown to us, a judicial proceeding is necessary, as appellants contend, to determine that a bank deposit is dormant, *the fact should not be overlooked that sections 8⁴⁷ and 16⁴⁸ authorize a collective suit for that purpose and unquestionably provide adequate procedure therefor.* The procedure prescribed is that set out in the Kentucky Civil Code of Procedure and appellants have not even intimated that said Code procedure does not meet the test of due process. This is respondents' "trump card." The collective suit feature of this Act will undoubtedly save it from a due process standpoint should this Court reverse the Kentucky Court

* Section 393.130, K.R.S.

* Section 393.110, K.R.S.

* Section 393.230, K.R.S.

of Appeals and hold the requirement in this Act of a voluntary delivery to the state of property presumed abandoned to be invalid.

The true test of due process was stated in *Dohany v. Rogers, supra*, as follows:

"The due process clause does not guarantee to the citizen of a state any particular form or method of state procedure. Under it he may neither have a right to trial by jury nor a right of appeal. . . . requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it."

We think that every feature of the Act meets this test, and have no fear that this court will hold otherwise.

The National Bank Question

In considering the question whether this Act is unconstitutional as applied to national banks, we must bear in mind that it was the object and purpose of Congress to make national banks amenable to local laws so as to give them local strength. *First National Bank v. Missouri*, 263 U. S. 640, 68 L. ed. 486; *McClellan v. Chipman*, 164 U. S. 347, 41 L. ed. 461; *First National Bank of Elizabethtown v. Commonwealth*, 143 Ky. 816, 137 S. W. 518; *Commonwealth v. Clark County National Bank*, 187 Ky. 151, 219 S. W. 175.

In *McClellan v. Chipman, supra*, this court said:

" . . . the purpose and object of Congress in enacting the national bank law was to leave such banks as to their contracts in general under the operation of the state law, and thereby invest them as Federal agencies with local strength, while, at the same time, preserving them from undue state interference wherever Congress within the limits of its constitutional authority has expressly so directed, or wherever

such state interference frustrates the lawful purpose of Congress or impairs the efficiency of the banks to discharge the duties imposed upon them by the law of the United States."

Thus, it is a general rule that national banks are subject to local statutes, and the Act in question is valid unless it comes within the exceptions to the rule.

The contracts of all national banks in Kentucky have their essence here and enjoy all the protection of the laws of this State. Although they are agencies of the Federal Government, they engage primarily in a local banking business for private gain to their stockholders, and the Government which created them intended that they would assume the customary obligations incident to the business of banking, one of which is, as held in the *Security Savings Bank* case, the obligation to pay ~~a~~ deposit to a person "duly authorized" to receive it. They are peculiar agencies of the Federal Government in that they are designed to operate mainly under State law. It is the negotiable instrument laws, the trust laws, and the general laws of the State under which they do most of their business and reap their profits. Since it is the intention of Congress that national banks operate under local laws so as to have greater local strength, and since they do so operate, Congress intends for them to be amenable to State laws to a greater extent than are Federal instrumentalities as a general rule.

The Act involved in this controversy is an integral part of the laws of this state relating to the descent and distribution of property and to the appointment of personal representatives. The parts of the Act which deal with such situations as where the owner of property dies intestate without heirs, or where an absent devisee fails to claim his legacy for such a period of time as to be presumed dead, or where there is an actual abandonment of property, are unquestionably essential to a complete and adequate law of descent and distribution. The parts of

this Act relating to dormant bank deposits and other unclaimed property over which there has been no act of ownership for a long period of time have been held by this Court to be similar in nature to the usual personal representative statutes. See *Provident Savings Institution v. Malone*, *supra*, the *Security Savings Bank case*, and *Corn Exchange Bank v. Coler*, *supra*.

It has not been alleged in appellants' petition nor has there been any proof taken in this case to the effect that this Act frustrates national banks in the performance of their governmental functions.

We concede that national banks are instrumentalities of the Federal Government and perform some governmental functions, but we have been unable to ascertain from the decisions of this Court or the Federal statutes with any degree of completeness the full governmental functions performed by national banks. We believe that appellants have the burden of alleging facts and adducing proof sufficient to show that this Act does materially and substantially interfere with some governmental function of national banks *in such a manner as to conflict with the national banking laws*. This, appellants have failed to do. Are there not bank experts whose testimony would be of some aid to the Court in determining whether this Act will have a substantial adverse effect upon national banks? Is not such adverse effect, if it exists, susceptible of proof? Would not an estimation of the volume of deposits affected by this Act be of importance to this Court? Can appellants have this Act held invalid as to national banks without even alleging and proving facts sufficient to show that the Act will impair "the efficiency of the banks to discharge the duties imposed upon them by the laws of the United States?" We think not, unless this Court can determine from judicial knowledge that the Act will have such an adverse effect upon national banks. We doubt that such a determination may be made entirely from the knowledge of the judiciary.

Assuming, however, that the effect of this Act on national banks is a matter which may be determined entirely by the court without any proof, respondents contend that the Act does not conflict with any of the governmental purposes or functions of national banks, but is actually beneficial to them.

There is nothing in the charter of national banks that makes the Act inapplicable to them, nor is there any Act of Congress which expressly provides that national banks are immune to such laws. Any immunity must, therefore, be implied.

It is well settled that a contract of deposit does not give banks a fontine right to keep deposits. In fact, all the banks are obligated to do is to pay deposits to the person "duly authorized" to receive them. See *Security Savings Bank v. California*, *supra*. National banks daily pay deposits to assignees, judgment creditors, payees, draftees, personal representatives, etc. Yet, we know of no Act of Congress which expressly requires them so to do. Apparently they do it because it is, and has always been, within the function and purpose of banks to pay deposits to the one legally authorized to receive them. It seems inherent in the banking business that deposits be paid to those lawfully entitled to receive them:

The State of Kentucky is "duly authorized" under this Act to receive dormant bank deposits as the personal representative of the owner and all parties having an interest therein. *Security Savings Bank v. California*, *supra*; *Provident Institution for Savings v. Malone*, *supra*. Thus, it would seem that *payment of dormant bank deposits to the State of Kentucky is in accord with and not contrary to the purpose of the national banking laws.*

There is no material difference between the contracts of deposit existing between state banks and their customers and those existing between national banks and their customers. Therefore, the *Security Savings Bank case*

clearly supports the proposition that a bank actually contracts to pay the deposit to the person "duly authorized" to receive it. How, then, can a national bank avoid paying a dormant bank deposit to the State of Kentucky in accordance with this Act without violating its contract? Will the courts hold that it is contrary to the national banking laws to require a national bank to perform its contract?

We would have no difficulty with this question but for the fact that this Court has held in *First National Bank of San Jose v. California*, 262 U. S. 366, 67 L. ed. 1030,⁴⁹ that the same California statutes which were held applicable to state banks in the *Security Savings Bank* case could not be applied to national banks. *We do not see how those two cases can be reconciled.* However, we have only an academic interest in this question.

There is a significant difference between the substantive provisions of the Kentucky Act and the California statutes. For this reason, the case at bar is not governed by the *San Jose* case, and we have no real reason to contend that the *San Jose* case should be overruled although we believe that it is unsound in principle.

In the first part of the opinion in the *San Jose* case, the court pointed out that the Supreme Court of California declined to express an opinion upon the question whether the California statutes effected a present *escheat* of the rights of depositors or whether they have the right under section 1272 of the California Code to prosecute an action to obtain payment of their deposits from the state within five (5) years. Thus, this Court was required to consider the Act as if it effected a *confiscation* of the deposit by failing to allow a depositor any right to recover the deposit from the state.

After making this observation, the Court makes no further direct reference to the confiscatory feature of the California law until near the end of the opinion where it

⁴⁹Hereinafter referred to as the *San Jose* case.

states that "the success of almost all commercial banks depends upon their ability to obtain loans from depositors and these might well hesitate to subject their funds to possible confiscation."

The Kentucky Court of Appeals, after carefully considering this opinion, has concluded that these California statutes were held inapplicable to national banks solely because of the adverse effect which this confiscatory feature of the California statutes would have upon the receipt of deposits by national banks. In this conclusion, we believe the Kentucky Court is sound.

This Court stated in the *San Jose* case that the California statute

"obviously attempts to qualify in an unusual way agreements between national banks and their customers, long understood to arise when the former received deposits under their plainly granted powers."

This statement, when thoroughly analyzed also shows clearly that the vice in the California statutes was their confiscatory feature. When making this statement, the Court had in mind the general principle of law that statutes, whether enacted before or after a contract of deposit is made, become a part thereof the same as if copied therein. See *Veir v. Sixth Ward Bldg. & Loan Assoc.*, 310 U. S. 32, 84 L. ed. 1061; *Home Bldg. & Loan Assoc. v. Blaisdell*, 290 U. S. 398, 78 L. ed. 413, 88 A. L. R. 1481; *Stephenson v. Binford*, 287 U. S. 251, 77 L. ed. 288, 87 A. L. R. 721. But, the Court placed emphasis on the unusual way in which the contracts were qualified and not upon the fact that they were qualified.

The contracts with the statutes read into them would provide that when a depositor fails for twenty (20) years to make some transaction of record indicating ownership of his deposit, the deposit, for that reason, would be subject to outright escheat by the state. This was the unusual

way in which the court found that the statutes attempted to qualify the contracts. The court said that this unusual qualification of the contract "might" have the effect of causing people not to make deposits in banks because of fear of possible confiscation. Thus, the statutes were held invalid not because of any qualifying effect which they would have on the contracts as such but because of the effect the confiscatory provisions in the contracts, as qualified, would have on the business of the banks—the curtailment of the making of deposits. It was not even contended in the case that the California statutes impaired the obligation of contracts in violation of Article 1, section 10 of the United States Constitution.⁵⁰

At page 37 of appellants' brief appears the following statement: "The vice in the California statute which this court said constituted an interference with the National Banking Act was the attempt by California to say how long a national bank could retain a deposit whether active or inactive." The basis for this statement is found in the following excerpt from the opinion of the San Jose case, also quoted at page 37 of their brief:

"If California may thus interfere other states may do likewise; and instead of twenty years, varying limitations may be prescribed—three years perhaps, or five, or ten, or fifteen. We cannot conclude that Congress intended to permit such results."

Examination of the language of the opinion preceding this excerpt discloses that the words "*thus interfere*" relate to the sentence wherein the court points out that the statutes interfere with national banks by qualifying their contracts in an unusual way. The words "such results" also relate to the qualification of contracts in an unusual way. Hence, the language seized upon by appellants does

⁵⁰ If, however, we are in error in this view and the California statutes were actually held invalid in the San Jose case because they impaired the obligation of contract (such reasoning is repudiated in toto by the Security Savings Bank case.

not support the interpretation which they seek to place upon it. When the words "three years perhaps, or five, or ten, or fifteen," are read in conjunction with the rest of the opinion, it is evident that the court had in mind only statutes which attempt to qualify the contracts of deposit by providing that deposits *may be confiscated on the mere ground that they have been dormant for the suggested periods of time*. This is the kind of statutes which the court said would be invalid.

The gist of appellants' interpretation of the *San Jose case* is that this court held the California statutes invalid as to national banks because those statutes attempted "to say how long a national bank could retain a deposit whether *active* or inactive."

The California statutes had no provision relative to *active* deposits and we do not find any basis in the opinion for saying that this court read any such provision into them. Neither do we find any basis in the opinion for saying that this court held, as an abstract proposition of law, that a state may *under no circumstances* take mere *custody* of a dormant bank deposit irrespective of the length of time during which it has been dormant. We do not think the court so held for three reasons: (1) There were no facts before the court on which it could have based any such holding; (2) no reason was assigned in the opinion for any such holding; and (3) there is no language in the opinion out of which such holding can reasonably be deduced.

We find absolutely nothing in appellants' brief which shows that the Kentucky Court of Appeals was in error when it construed the *San Jose case* as holding the California statutes inapplicable to national banks *solely* because they authorized the state to confiscate dormant bank deposits and *might* for that reason have the effect of causing people not to place deposits with national banks.

Appellants argue that there is no substantial difference between the Kentucky Act and the California stat-

utes because under the Kentucky Act, the state is authorized by section 16¹¹ thereof to file a suit to establish a defeasible title to deposits after it has them in custody; whereas, the State of California did the same thing in one proceeding. The crux of this argument is that the State of Kentucky does in two steps the same thing which the State of California attempted to do in one step. This argument is fallacious because under the Kentucky Act property is never *escheated* or *confiscated* on the ground of mere dormancy, while under the California statutes property is escheated on such ground. *Anderson National Bank, et al. v. Reeves, et al.*, 293 Ky. 735, 170 S. W. (2d) 350.

The second step to which appellants refer is a court proceeding to establish (1) death intestate of the owner without heirs or (2) *actual* abandonment. If such grounds are established, the state takes title to the property *subject to defeasance at any time within five (5) years*.

Appellants admit at page 25 of their brief that the state may escheat outright a deposit in a national bank on the ground that the owner has died intestate without heirs. See *Territory of Alaska v. First National Bank of Fairbanks*, 22 F. (2d) 377. If this is true, may the state not escheat a deposit held in its custody on the same ground?

Actual abandonment is historically as valid a ground for the state's taking title to property as is death intestate without heirs. See *1 Am. Jur. 2, sec. 3*. At any rate, the validity of this second proceeding is a moot question so far as concerns this case because, as previously noted, appellants admit that the validity of sections 3, 4, 5 and 6¹² of the Act are not in issue on this appeal; and the Kentucky Court of Appeals has held that their validity was not in question on the appeal before it.

In view of these considerations, the conclusion is inescapable that the Kentucky Court of Appeals has prop-

¹¹ Section 393.210, K.R.S.

¹² Sections 393.020, 393.030, 393.040, and 393.050, K.R.S.

erly held that the *San Jose* case is not on all fours with the case at bar and is not conclusive of the national bank question presented herein. Hence, the question whether this Kentucky Act is applicable to national banks is truly an open one.

What effect, if any, does this Kentucky Act have upon national banks that is foreign to the national banking laws or materially impairs their efficiency in performing their governmental functions? We know of none and appellants have brought none to the attention of this Court.

When a deposit is paid under this Act to the state as legal representative of the depositor, is the effect any different on national banks than when they pay a deposit to the committee of an insane person? In either instance the payment is made in accordance with their contract to the person "duly authorized" to receive it. *Security Savings Bank case*. Appellants attempt to distinguish the two situations by saying that in the case of an insane person, there is a judicial determination of insanity. This distinction is faulty because it puts the emphasis on procedure and not upon the effect which the law has on the bank.⁵³ In both instances the direct effect of the law upon the bank is that it loses the right to keep the deposit.

A statute which gives a state absolute title to bank deposits on the mere ground that they are dormant or inactive for a designated period of time, might, as stated by the court in the *San Jose* case, cause people to refrain from placing deposits with banks, but this is a rather speculative reason on which to base the invalidity of a state statute. However, the Kentucky Act, which authorizes the state to take mere custody of deposits on such grounds for the benefit of all persons having an interest therein, would clearly not cause people to refrain from making deposits

⁵³ The procedural question has been considered herein under the heading due process. The question now under consideration is: Assuming the procedure is appropriate, does the Act conflict with the national banking laws?

because of any apprehended fear of confiscation. On the contrary, it seems that the Act *might* cause people to make bank deposits for the following reasons:

(1) It would protect depositors against loss of their deposits from forgetfulness.

(2) It would protect depositors against loss of their deposits in case they, through negligence or inadvertence, lose trace of it.

(3) It would result in the placing of unclaimed deposits in a centralized place where a person could, by making a single inquiry, ascertain the existence of such property.

The attributes of the Act enumerated above show how foreign the idea of confiscation is to the Act.

This Act confers benefits on national banks as well as on their depositors. Without such legislation, what legal disposition can be made of an unclaimed deposit? Even if a deposit has been dormant for two or three hundred years, a national bank cannot legally write it off its books as a profit without the sanction of a state statute, because the Federal Government has no power to escheat property outside its territorial jurisdiction and, therefore, may not confer such power on national banks. *American Loan Co. v. Grand R. Co.*, 159 Fed. 775. Both public policy and good business practices would seem to require that some final disposition of such property be made.³⁴ One of the incidental effects of this Act is to give the banks a means of closing such accounts.

Appellants have not even attempted in argument to point out to this court any specific manner in which the substantive provisions of this Act conflict with the national banking laws. They bottom their case entirely on the

³⁴The necessity for a statute similar to this Kentucky Act is manifested by the numerous State statutes dealing solely with unclaimed bank deposits, not to mention statutes dealing with other classes of unclaimed property. See *amicus curiae* brief of the State of Minnesota (joined in by State of Wisconsin) at page 16.

San Jose case.⁵² It is true that they rely on *American National Bank of Nashville, et al., v. Clarke, Superintendent of Banks*, 135 S. W. (2d) 935, 175 Tenn. 480; *Starr, Attorney General v. O'Connor, Comptroller of the Currency, et al.*, 118 F. (2d) 548 (6 C. C. A.). Certiorari denied, 314 U. S. 695; *National City Bank v. Philippine Islands*, 302 U. S. 651. But, those cases in turn rest entirely upon the *San Jose case*. Since we have clearly distinguished that case from the one at bar, those cases also stand distinguished.

The case at bar presents just one aspect of the general question of intergovernmental immunities. For the past decade this Court has been growing more reticent in its application of the doctrine of intergovernmental immunities as a ground for holding invalid state or federal statutes. There is an escheat case, *United States v. Klein*, 303 U. S. 276, 82 L. ed. 840, which is a good example of this trend. In that case this court held that the State of Pennsylvania could escheat funds paid to the United States Treasury pursuant to Federal statutes (R. S. 996) which require the Federal District Courts to pay to the Treasury unclaimed deposits held by them for five (5) years. The statutes further provide that the owner of any funds which have been delivered to the Treasury may obtain a refund on proving his claim before the District Court which paid the money to the Treasury. The State of Pennsylvania, pursuant to its escheat law, obtained a judgment in a State court for certain funds in the United States Treasury. Pennsylvania filed that judgment with the proper District Court, and that Court recognized the judgment of

⁵² Appellants do make some fuss about the penalty provision in section 20 of the Act. Their point in connection with this provision is rather vague. The legislature probably put this provision in the Act because it had learned from experience with KRS 287.410 that it would not be complied with unless there was some enforcement provision. Attention is called to the fact that the penalty is for "refusing", not "failing" to make a report and that any person may under the terms of the Act, *although refusing to make the report*, be relieved of any threat of penalty by making a compliance bond.

the State Court and ordered that the Treasury surrender the funds to the State of Pennsylvania. The District Attorney excepted on the ground that such procedure was an interference with a Federal instrumentality. The United States Supreme Court sustained the decree of the District Court on the ground that it was no interference with the instrumentality to require it to pay money to the person *lawfully entitled to receive it*.⁵⁶ There is no substantial distinction between this case and the one at bar.

A rather complete re-examination and overhauling of the doctrine of intergovernmental immunities was made in, *Graves v. New York*, 306 U. S. 465, 83 L. ed. 927. In that case, the Court reconsidered *Collector v. Day*, (*Buffington v. Day*) 11 Wall 113, 20 L. ed. 122, and *New York ex rel. Rogers v. Graves*, 299 U. S. 401, 81 L. ed. 306, and overruled them in "so far as they recognize an implied constitutional immunity from income taxation of the salaries of officers or employees of the national or state government or their instrumentalities."

Mr. Justice Stone delivered the opinion for the Court, and speaking with reference to taxing powers of the state, said:

"... The burden, so far as it can be said to exist or to affect the government in any *indirect or incidental* way, is one which the Constitution presupposes, and hence it cannot rightly be deemed to be within an implied restriction upon the taxing power of the national and state governments which the Constitution has expressly granted to one and has confirmed to the other. The immunity is not one to be implied from the Constitution because if allowed it would impose to an inadmissible extent a restriction on the taxing power which the Constitution has reserved to the state governments."

⁵⁶ See also *Territory of Alaska v. First National Bank of Fairbanks*, 22 F. (2d) 377, wherein the Ninth Circuit Court of Appeals held the Territory of Alaska could escheat deposits in national banks on the ground that the depositor had died intestate without heirs.

This case clearly indicates that state tax statutes will no longer be unconstitutional because of some "indirect or incidental" effect they may have on a federal instrumentality. The same should be true of any police statutes of a state because the police power of the state is the most essential and "the least limitable of the powers of government." *McDonald v. Mabee*, 243 U. S. 90, 61 L. ed. 608; *Hall v. Geiger-Jones Co.*, 242 U. S. 539, 61 L. ed. 480; 11 *Am. Jur.* 974, sec. 248.

The extent to which the whole doctrine of intergovernmental immunity was re-examined and overhauled in this case is indicated by Mr. Justice Frankfurter's concurring opinion therein. He points out that in *McCullough v. Maryland*, 4 Wheat 316, 4 L. ed. 579, Chief Justice Marshall expressed the unfortunate dictum that "the power to tax involves the power to destroy," and that that dictum came to be "treated as though it were a constitutional mandate" to such an extent that the court in several opinions held that certain state statutes interfered with federal instrumentalities and that certain federal statutes interfered with state governments although no material or substantial interference existed. Mr. Justice Frankfurter also states that:

"All these doctrines of intergovernmental immunity have until recently been moving in the realm of what Lincoln called 'pernicious abstractions.' The net of unreality spun from Marshall's famous dictum was brushed away by one stroke of Mr. Justice Holmes' pen: 'The power to tax is not the power to destroy while this court sits.'"

What does all this language mean? Does it not mean that the degree of the interference will hereafter be the test and that the statutes of one government will not be stricken down under the doctrine of intergovernmental immunities because of some speculative or insubstantial effect they may have on the functions of the other government?

In the light of these recent decisions dealing with the doctrine of intergovernmental immunities, the *Security Savings Bank case*, *Provident Institution for Savings v. Malone, supra*, *United States v. Klein, supra*, and other decisions of this Court, we believe that the *San Jose case* is unsound in principle and concur fully in the view expressed in the *amicus curiae* briefs filed on behalf of the States of Minnesota (joined in by the State of Wisconsin) and Michigan to the effect that the case should be overruled.

However, it has been shown throughout this brief that an overruling of the *San Jose case* is not essential to a decision of this Court affirming the decision of the Kentucky Court of Appeals. The point we urge most is that the Kentucky Act is completely free of the vice which was attributed to the California statutes in the *San Jose case*, and that the Kentucky Court of Appeals has correctly held that the Act comes within the general rule that national banks are amenable to state laws. In fact, it is a statute of the character which Congress intended should be complied with by national banks, and it would, therefore, not be in conflict with the national banking laws even if it did, in an economic or business sense, lay some burden on national banks which is not the case.

National banks are required to pay their debts even though it may result in closing their doors, because Congress intends that their debts be paid. Personal representatives are among those to whom Congress intends that payment be made. Under the Act, the State of Kentucky acts as a personal representative when it receives dormant bank deposits. Hence, we insist that this Act not only does not conflict with the national banking laws, but Congress actually intends that national banks comply therewith.

CONCLUSION

It is respectfully submitted that the decision of the Court of Appeals of Kentucky should be affirmed.

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APPENDIX

ACTS OF THE GENERAL ASSEMBLY, 1940, CHAP. 79
(H. B. 321), P. 333, KY. ST. 1605a-1622-1.

May 1940 Supplement to 1936 Statutes.

AN ACT relating to all classes of property actually or presumptively subject to escheat; providing the terms upon which presumption of abandonment of property and presumption of the death of persons shall be determined; providing how and when said property may be escheated to the Commonwealth of Kentucky; providing for the reduction of all such property to cash, transferring the possession of same to the Treasurer of Kentucky; providing how any person who is legally entitled thereto may recover same from the Treasurer; providing that any person transferring property to the Commonwealth as required by this Act shall be relieved of liability to the owner thereof or reimbursed for any liability or damage incurred by complying with this Act; defining certain words; providing for reports and examination of records; providing for the administration and enforcement of this Act, and for an Assistant Attorney General as incident thereto; providing fines, penalties, and imprisonment for failure to comply with this Act; providing that if any provision of this Act shall be held unconstitutional that it is the Legislative intent that all other provisions thereof shall remain in force and effect; repealing sections 1610 to 1623, inclusive of Carroll's Kentucky Statutes, Baldwin's 1936 Revision; repealing all Acts and parts of Acts in conflict with this Act; repealing Chapter 168, Acts of the Regular Session of the 1938 General Assembly of the Commonwealth of Kentucky; and repealing, amending and re-enacting sections 1606, 1607, 1608, and 1609 of Carroll's Kentucky Statutes Baldwin's 1936 Revision.

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"Sec. 1. That sections 1610 to 1623 inclusive of Car-

roll's Kentucky Statutes, 1936 edition, and Chapter 168, Acts of the Regular Session of the 1938 General Assembly be, and the same are hereby repealed.

"Sec. 2. (393.010)* Whenever used in this Act, unless the context requires otherwise, the word 'person' shall mean and include any individual, state and national bank, partnership, joint stock company, business, trust, association, corporation, or other form of business enterprise, including a receiver, trustee, or liquidating agent.

"Whenever used in this Act, unless the context requires otherwise, the word 'claim' shall mean to demand payment or surrender of property from the person whose duty it is to pay the claimant, or surrender to him the property involved..

"Sec. 3. That section 1606 of Carroll's Kentucky Statutes, 1936 edition, be repealed, amended, and re-enacted so that when amended and re-enacted it shall read as follows:

(393.020) "That part of estate or property having a situs in this Commonwealth, not disposed of by will of persons who have died, or may hereafter die without heirs or distributees entitled to the same; or which have been or may hereafter be devised to any person, or any heir or distributee or devisee of such person or of the testator, who has not claimed the same or shall not claim the same within eight (8) years after such death, shall vest in the Commonwealth, subject to all legal and equitable demands on same. All such property shall be liquidated and the proceeds thereof, less costs, fees, and expenses incidental to all legal proceedings of such liquidation shall be paid to the Department of Revenue. Any estates or property except a perfect title to a corporeal hereditament, which estates or property have been abandoned by the owner thereof, shall

* References are to corresponding sections of K.R.S. Although the revisers changed the language somewhat in the Revised Statutes, no change was made in the meaning of the section of the Act.

also vest in the Commonwealth, subject to all legal and equitable demands on same. All such property shall be liquidated and the proceeds thereof, less costs, fees, and expenses incidental to all legal proceedings of such liquidation shall be paid to the Department of Revenue.

"Sec. 4. That section 1607 of Carroll's Kentucky Statutes, 1936 edition, be repealed, amended, and re-enacted so that when amended and re-enacted it shall read as follows:

(393.030) "The personal representatives of persons, whose estates or a part of whose estates are not distributed by will, and who died without heirs or distributees entitled to same, shall settle their accounts within one (1) year after qualifying as such and pay over to the Department of Revenue the proceeds of all personal estate, first deducting the proper legal liabilities of the estate.

"(1) If the whole personal estate cannot be settled and the accounts closed within one (1) year, the settlement as far as practicable, shall then be made and the proceeds paid over to the Department of Revenue, and the residue shall be so settled and paid over as soon thereafter as can be properly done.

"(2) The personal representative shall take possession of the real estate of such decedent not disposed of by his will, and rent out the same from year to year until it is otherwise legally disposed of, and pay the net proceeds to the Department of Revenue.

"(3) The personal representative shall also make out and transmit to the Department of Revenue a description of the quantity, quality, and estimated value of such real estate and its probable annual profits.

"Sec. 5. That section 1608 of Carroll's Kentucky Statutes, 1936 edition, be repealed, amended, and re-enacted, so that when amended and re-enacted it shall read as follows:

(393.040) "If any devisee or his heirs, advisee or distributee, or any heir or distributee of a testator has failed

or shall hereafter fail for eight (8) years to claim his legacy the personal representative of such testator or other person having the same in possession shall, after deducting the legal liabilities thereon, pay and deliver over such legacy, whether the same be real or personal estate, and the net profits thereof to the Department of Revenue.

"Sec. 6. That section 1609 of Carroll's Kentucky Statutes, 1936 edition, be repealed, amended, and re-enacted, so that when amended and re-enacted it shall read as follows:

(393.050) "When any person owning property or estates having a situs in this Commonwealth is not known to be living for seven (7) successive years, and neither said owner, his heirs, devisees, or distributees can be located or proved to have been living for seven (7) successive years, such person shall be presumed to have died without heirs, devisees, or distributees, and both his real and personal estate shall be liquidated and the proceeds, less costs incident to the liquidation and any legal proceedings, and less the liabilities which have been properly claimed and approved against same, shall be paid to the Department of Revenue.

(393.060 to 393.100 inclusive) "Sec. 7. When the owner or owners (whether such ownerships be legal, beneficial, equitable, or otherwise) of deposits payable on demand in any bank or trust company (either state or national) within this Commonwealth, have not or shall not within ten (10) successive years next preceding the date as of which reports are required to be made by section 8 of this Act, (a) negotiated in writing with the bank or trust company in respect thereto, or (b) been credited with interest on the pass book or certificate of deposit on his or their request, or (c) had a transfer, disposition of interest, or other transaction noted of record in the books or records of such bank or trust company, or (d) increased or decreased the amount of the deposit, such deposit and the interest thereon shall be presumed abandon.

“When the owner or owners (whether such ownerships be legal, beneficial, equitable, or otherwise) of deposits other than those payable on demand in any bank or trust company (either state or national) within this Commonwealth, have not or shall not within twenty-five (25) successive years next preceding the date as of which reports are required to be made by section 8 of this Act, (a) negotiated in writing with bank or trust company in respect thereto, or (b) been credited with interest on the pass book or certificate of deposit on his or their request, or (c) had a transfer, disposition of interest, or other transaction noted of record in the books or records of such bank or trust company, or (d) increased or decreased the amount of the deposit during said period, such deposits and the interest thereon shall be presumed abandoned.

“All deposits of money, stocks, bonds, or other credits of any kind whatsoever made to secure payment for services rendered or to be rendered, or to guarantee the performance of services or duties, or to protect against damage or harm and the increments thereof, shall be presumed abandoned unless claimed by the person entitled thereto within ten (10) years after the occurrence of such event as would obligate the holder or depository to return the same or the equivalent thereof to the proper owner or claimant.

“All dividends, stocks, and bonds and the increments thereof, all monies and credits and the increments thereof, all claims for monies and credits and the increments thereof, and all intangible personal estate or property whatsoever and the increments thereof, held within this Commonwealth by any person for the benefit of another person shall be presumed abandoned unless claimed by the beneficiary or person entitled thereto within ten (10) years from the time the holder, trustee, debtor, or other responsible person became obligated to return the same or the equivalent thereof to the proper owner or claimant. If the increments or benefits payable on any instrument are not claimed within the

time and manner prescribed in this paragraph, the instruments or evidence of the debt or obligation shall likewise be presumed abandoned.

"All estate or property paid into any court of this Commonwealth for distribution and the increments thereof shall be presumed abandoned if not claimed within five (5) years after the estate was so paid into court, or as soon after said five (5) year period as all claims filed in connection therewith shall have been disclosed or settled by the court.

"None of the provisions of this Act shall apply to bonds of counties, cities, school districts, or other tax levying sub-divisions of this Commonwealth.

(393.110) "Sec. 8. It shall be the duty of all state and national banks, trust companies, or other persons, and courts of this Commonwealth or the agents thereof, whether holding estates or property as bailee, depository, debtor, trustee, executor, liquidator, administrator, distributor, receiver, or other capacity coming within the purview of section 7 of this Act, to report annually to the Department of Revenue as of July 1, all property held by them declared by this Act now to be presumed abandoned, and all property which shall hereafter become presumed abandoned under the provisions of this Act. The report shall be filed in the offices of the Department of Revenue in Frankfort on or before September 1 of each year for the preceding July 1, and shall give the name of the owner, his last known address, the amount and kind of property, and such other information as the Department of Revenue may require for the administration of this Act. Such person or court as may have made report of any estate or property presumed abandoned, as required in this Act, shall, within four (4) months after July 1, turn over to the Department of Revenue all property so reported; except, that if the person making such report, or any other person or persons are able to prove by competent evidence on hearing before the Commissioner of Revenue that the owner or person entitled

to the property has subsequently within said four (4) months transacted business resulting in writing of record in the books of the person or court making the report, which shows the owner or person entitled to the estate or property has knowledge thereof and still claims his legal or equitable right thereto or has by other competent evidence clearly manifested such knowledge or claim, it shall not be the duty of the person or court making such report or in possession of such property to surrender it to the Department of Revenue.

(393.120) "Sec. 9. Any intangible personal estate or property required by sections 7 and 8 of this Act to be liquidated so as to permit payment thereof to the Department of Revenue, shall be surrendered to the Department of Revenue and sold by the Department of Revenue at public sale at Frankfort, or in such other city in the Commonwealth as may in its judgment afford the most favorable market for the particular property involved, to the highest bidder; provided, that it may decline the highest bid and reoffer the property for sale if it deems the price offered insufficient. Such sale shall be advertised at least one week before the date of the sale in a newspaper of general bona fide circulation in the county where said property was found or abandoned, and in the county where the sale is to be made and the sale shall be held at the courthouse door.

(393.130) "Sec. 10. Any person who shall transfer to the Department of Revenue, property to which the Commonwealth is entitled under the provisions of this Act, is hereby relieved of any liability to the owner of such property arising from such transfer; however, if any such person cannot be relieved of such liability by the provisions of this section, the Commonwealth shall reimburse such person for all liability to the owner of the property or estate or damage incurred by reason of compliance with the provisions of this Act.

(393.140) "Sec. 11. Any person claiming an interest in estates or property paid or surrendered to the Commonwealth in accordance with the provisions of sections 3, 4, 5, or 6 of this Act, who was not actually served with notice and who did not appear, and whose claim was not considered during the action or at the proceedings which resulted in the payment of same to the Commonwealth, may within five (5) years after the judgment file his claim thereto with the Department of Revenue.

"Any person claiming an interest in estates or property paid or surrendered to the Commonwealth in accordance with sections 7, 8, or 9 of this Act, which was not subsequently adjudged under the procedure set out in section 16 of this Act to have been actually abandoned, or owned by a decedent who had no heir, distributee, devisee, or other person entitled under the laws of this Commonwealth relating to wills, descent and distribution, to take the legal or equitable title to such estate or property, may file his claim thereto at any time after same was paid to this Commonwealth.

"The claimant shall within fifteen (15) days after filing any claim permitted under this section publish notice of such claim in a newspaper of general bona fide circulation in the county in which the property was held before being transferred to the Commonwealth as herein provided. If there be no such newspaper, the claimant shall post such notice at the courthouse door and in three other conspicuous places in said county, and shall file proof of such publication or posted notice with the Department of Revenue. No such claim shall be allowed until fifteen (15) days after proof of such notice is received by the Department of Revenue at its offices in Frankfort.

(393.150, 393.160) "Sec. 12. It shall be the duty of the Commissioner of Revenue to consider any claim and/or defense permitted to be filed before it and to hear evidence in respect thereto. If the claimant establishes his claim, the Commissioner of Revenue shall, when the time for appeal

or further legal procedure herein provided has expired, authorize payment to him of a sum equal to the same amount which was paid into the Treasury in compliance with this Act. The decision shall be in writing and shall state the substance of the evidence heard by the Commissioner of Revenue if a transcript thereof be not kept and such decision shall be a matter of public record.

"Any person, petitioner, or claimant dissatisfied with the decision of the Commissioner of Revenue may within sixty (60) days, appeal from such decision to the Franklin Circuit Court or file an action in said court to vacate such decision. In either event the proceedings shall be de novo, and no transcript of the record before the Commissioner of Revenue shall be required to be kept unless requested by the claimant. In any such proceeding before the Franklin Circuit Court, the Commissioner of Revenue shall be made a party defendant, and all other persons required by law to be made parties defendant or plaintiff and served with actual or constructive notice in rem or quasi in rem actions shall be so treated. Any party adversely affected by the decision of the Franklin Circuit Court may appeal to the Kentucky Court of Appeals in the manner now generally provided by law, but such appeal must be commenced within sixty (60) days after the judgment. However, the Commonwealth shall in no event be required to make a supersedeas bond. The provisions of this section which relate to the decision of the Commissioner of Revenue and appeals therefrom shall also apply to a decision of the Commissioner rendered under authority of section 8 of this Act requiring payment to the Department of Revenue over the protest of the holder or claimant of the property.

(393.170) "Sec. 13. Whenever any estate or property, which may be escheated under the provisions of this Act by reason of actual abandonment, or death and for presumption of death of the owner without an heir, distributee, devisee or other person entitled to take the legal or

equitable title to such estate or property under the laws of this Commonwealth relating to wills, or descent and distribution, has or shall hereafter be deposited with, or in the custody of, or under the control of any court of the United States in and for any district within this Commonwealth, or in the custody of any depository, clerk or other officer of such court, or shall have been surrendered by such court or its officers to the United States Treasury, the circuit court of this Commonwealth in any county in which such court of the United States sits, shall have jurisdiction to ascertain whether an escheat has occurred, and to enter a judgment of escheat in favor of the Commonwealth. Provided, however, this section shall not be construed as authorizing a judgment to require such courts, officers, agent, or depositories to pay or surrender such funds to the Commonwealth on a presumption of abandonment as provided in sections 7 and 8 of this Act.

(15.140) "Sec. 14. To aid in the enforcement and administration of the provisions of this Act, the Attorney General shall, with the approval of the Governor, appoint an additional Assistant Attorney General, having at least the qualifications of the Sixth Assistant Attorney General, and assign him to the Department of Revenue. It shall be the special duty of such Assistant Attorney General to represent the Commonwealth at the hearings required by this Act to be held before the Commissioner of Revenue to consider claims filed pursuant to section 11 of this Act; to advise the Department of Revenue, county attorneys, and all other inquiries, with respect to questions arising under the provisions of this Act; to aid in the prosecution of all other actions or proceedings authorized by this Act when so directed by the Commissioner of Revenue or the Attorney General; and to perform such other duties as are imposed on him by any provision of this Act. Provided, however, his opinions shall be subject to the approval of the Attorney General in the same manner as is such work of other Assistant Attorneys General now established by law, and

he shall also have the other ordinary powers and duties of an Assistant Attorney General.

"He shall receive a salary not exceeding four thousand dollars (\$4,000) a year, to be fixed by the Attorney General and the Commissioner of Revenue as provided by law, which shall be paid on authorization of the Commissioner of Revenue in the same manner as employees of the Department of Revenue are generally paid.

(393.180 to 393.220 inclusive) "Sec. 15. All legal proceedings to enforce sections 3, 4, 5, and 6 of this Act shall be instituted on the relation of the Commissioner of Revenue.

"It shall be the duty of the county attorney of a county in which any estate or property is located, coming within the purview of sections 3, 4, 5, or 6 of this Act, to institute such legal proceedings as are necessary to enforce the provisions of said sections and to recover such sums as are due the Commonwealth thereunder. The petition and all pleadings necessary to be filed in such proceedings shall be on the relation of the Commissioner of Revenue and shall be sent to the Commissioner of Revenue for his signature and approval. The petition shall be accompanied by an affidavit of the county attorney, stating the facts on which it is based. For all other pleadings, there shall be a statement by the county attorney of the reason for the particular pleading.

"On any action or proceeding filed by a county attorney under the provisions of this Act, it shall be the duty of the Assistant Attorney General, provided for in section 14 of this Act, to offer assistance and suggestions to the county attorney in the preparation of the petition or any pleadings, and to revise and correct same as he may deem necessary, subject to the ultimate approval of the Commissioner of Revenue, when he is required to sign same.

"If the estate or property of a person coming within the purview of sections 3, 4, 5, or 6 of this Act is located in two or more counties, all such property may be included in

one action or proceeding; provided, however, that the county attorneys of all counties in which such property is located may join in the prosecution of the action or proceeding, and their fees shall be determined by the amount of money derived from the property located within their respective counties when possible to determine such figure; otherwise, the courts shall determine their fees by equitable apportionment in accordance with the value of the property which is located in their respective counties.

“If the county attorney performs all the duties imposed upon him by this Act relating to enforcement of the provisions of sections 3, 4, 5, or 6, he shall be entitled to a fee of fifteen per cent (15%) of any sum recovered in such proceeding, except that the county attorney's fee shall be limited to five per cent (5%) on intangible property recovered in excess of one thousand dollars (\$1,000).

“In the event that a county attorney declines to perform the duties imposed upon him by this Act, they may be performed by the Commissioner of Revenue and the county attorney shall not be entitled to any fee. The Commissioner may, when he deems it to the best interest of the Commonwealth, institute any action authorized by this Act to be brought by the county attorney, or join the county attorney in the active prosecution of any such action. The county attorney shall be entitled to his fee in either instance if he does his duty.

Pending the outcome of an action or court proceeding, the court may make such disposition of the land or tangible personal property involved as may seem best from the standpoints of use, rents, interest, and profits. In the event the use of the property is given to the claimant by the court, such claimant shall be held accountable for returns and profits arising from such use, if the Commonwealth be successful in such proceeding.

(393.230 and 393.240) “Sec. 16. In the event any person refuses to pay or surrender voluntarily intangible estate or property to the Department of Revenue, as provided in

sections 7 or 8 of this Act, or if the agent of any court refuses so to do, a proceeding may be brought on the relation of the Commissioner of Revenue as an equity action in a court of competent jurisdiction to force such payment or surrender of property, and all property subject to said sections 7 and 8 may be listed and included in a single action.

"If intangible estates or property are turned over to the Department of Revenue on presumption of abandonment, in accordance with sections 7, 8 or 9 of this Act, the Commissioner of Revenue may at any subsequent time institute proceedings in a court of competent jurisdiction to establish conclusively that such estate or property was actually abandoned, or that the owner thereof is dead and there are no heirs, devisees, distributees, or any other persons entitled to succeed to the title of same.

"In the event a particular person or persons may have property coming within the purview of section 3, 4, 5, or 6 of this Act, and also sections 7 or 8 of this Act, the actions herein required to be brought by the county attorney and the Commissioner of Revenue may be joined, but joinder is not required, and if separate actions shall be brought, they shall not be considered as coming within the rule against splitting a cause of action. The county attorney shall not be charged with the duty of enforcing sections 7, 8, 9, and 12 of this Act.

"The procedure for any and all actions or proceedings permitted or necessary under this Act to be filed in a court of competent jurisdiction shall be the same as that now provided in Carroll's Kentucky Civil Code of Practice, unless provided differently herein, except that all such actions or proceedings shall be filed as equity actions.

(393.250) "Sec. 17. "All money received by the department of Revenue under the provisions of this Act shall be deposited with the State Treasury and credited to the account of the General Expenditure Fund; provided, however, that ten per cent (10%) of such sum so received during the fiscal year beginning July 1, 1940, and ten per

cent (10%) of such sum so received during the fiscal year beginning July 1, 1941, shall be added to and made a part of the appropriation available to the Department of Revenue for the respective fiscal years. After June 30, 1942, the legislature shall make provision for the administration of this Act in the regular budgetary appropriation made for the Department. All the expense necessary and required to be paid by the Commonwealth in administering and enforcing this Act shall be paid, out of the funds available to the Department of Revenue, and such expenses shall be paid in the same manner as other claims upon the Commonwealth are paid.

"The county attorney shall act as agent of the Department of Revenue for the collection of all judgments recovered in actions prosecuted by him under the provisions of this Act and he shall deduct the fee allowed him for his services performed pursuant to this Act, and promptly remit such collections to the Department of Revenue, with such information relating thereto as the Department may require.

(393.260) "Sec. 18. Any action permitted by this Act to be brought by the Commonwealth must be brought within fifteen (15) years from the effective date of this Act or from the time when the cause of action accrued, whichever is the later date.

(393.270) "Sec. 19. Any person under disability affected by this Act shall have five (5) years after the disability is removed in which to take any action or procedure or make any defense allowed to one sui juris.

(393.280, 393.290, 393.990) "Sec. 20. The Department of Revenue, through its employees, is also authorized to examine all records of state and national banks or trust companies, corporations, companies, partnerships, agencies, and persons where there is reason to believe that there has been or is a failure to report property which should be reported under the provisions of this Act.

"The Commissioner of Revenue shall have authority to promulgate such reasonable rules and regulations as are necessary for the enforcement of this Act, and to govern hearings provided in this Act to be held before him. Provided, however, he may delegate in writing to any regular employee of the Department of Revenue authority to perform any of the duties imposed on him by this Act excepting the promulgation of rules and regulations.

"Any person, or representative thereof refusing to make any report as required by this Act, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty dollars (\$50) or more than two hundred dollars (\$200), or imprisoned not less than thirty (30) days or more than six (6) months, or both so fined and imprisoned. The Department of Revenue shall also have authority, as herein provided, to require such reports, or the surrender of such property, by civil action, including an action in the nature of a bill of discovery, in which case such person shall be required to pay a penalty equal to ten per cent (10%) of all amounts which he may ultimately be required to surrender, but in no event shall said penalty exceed five hundred dollars (\$500).

"Any person bona fide contesting the applicability of this Act to him may be relieved of the threat of any fine or penalty by posting a compliance bond in an amount and of surety sufficient to the court.

"Sec. 21. All Acts and parts of Acts in conflict with this Act are, to the extent of such conflict, hereby repealed.

"Sec. 22. It is the intent and purpose of the General Assembly of this Commonwealth of Kentucky to enact each and every provision of this Act separately, so that in the event the courts for any reason should hold any provision thereof void, or the application of any provision thereof void, then all other provisions or the application of any or all other provisions shall be deemed to remain in full force and effect; and it is hereby expressly declared

that the General Assembly would have enacted any part or provisions of this Act, irrespective of any other part or provision thereof.

Approved March 1, 1940, by
Governor Johnson."

ACTS 1942, CHAPTER 156, P. 637

Sec. 8, 1942 Amendment

(K.R.S., 393.110)

"It shall be the duty of all state and national banks, trust companies, or other persons, and courts of this Commonwealth or the agents thereof, whether holding estates or property as bailee, depository, debtor, trustee, executor, liquidator, administrator, distributor, receiver or in any other capacity coming within the purview of section 7 of this Act, to report annually to the Department as of July 1, all property held by them declared by this Act to be presumed abandoned. The report shall be filed in the offices of the Department on or before September 1 of each year for the preceding July 1, and shall give the name of the owner, his last known address, the amount and kind of property, and such other information as the Department may require for the administration of this Act.

"The report shall be made in duplicate; the original shall be retained by the Department, and the copy shall be mailed to the sheriff of the county where the property is located or held. It shall be the duty of the sheriff to post said copy on the court house door or the court house bulletin board. The sheriff shall immediately certify in writing to the Department the date when said copy was posted. Said copy must be posted on or before October 1 of the year when it is made, and shall be constructive notice to all interested parties and shall be in addition to any other notice provided by statute or existing as a matter of law.

"Any person who has made a report of any estate or

property presumed abandoned, as required by this Act, shall, between November 1 and November 15 of each year, turn over to the Department all property so reported; but if the person making the report or the owner of the property shall certify to the Department by sworn statement that any or all of the statutory conditions necessary to create a presumption of abandonment no longer exist or never did exist, or shall certify the existence of any fact or circumstance which has a substantial tendency to rebut such presumption, then, the person reporting or holding the property shall not be required to turn the property over to the Department except on order of court. No person shall be required to surrender any property on a presumption of abandonment to the Department if the period of time provided by any statute of limitation applicable to the owner's rights as against the holder has expired unless the court orders him to do so. If a person files an action in court claiming any property which has been reported under the provisions of this Act, the person reporting or holding such property shall be under no duty while any such action is pending to turn the property over to the Department, but shall have the duty of notifying the Department of the pendency of such action.

"The person reporting or holding the property or any claimant thereof shall always have the right to a judicial determination of his rights under this Act and nothing therein shall be construed otherwise; and the Commonwealth may institute an action to recover such property as is presumed abandoned whether it has been reported or not and may include in one petition all such property within the jurisdiction of the court in which the action is brought provided the property of different persons is set out in separate paragraphs."

IN THE
Supreme Court of the United States

OCTOBER TERM, 1943.

No. 154.

ANDERSON NATIONAL BANK, Suing on Behalf of Itself and
All Others Similarly Situated, *Appellants*,

v.

H. CLYDE REEVES, Individually and as Commissioner of
Revenue of the State of Kentucky, Etc., Et Al.,
Appellees.

Appeal from the Court of Appeals of the State of Kentucky.

**BRIEF OF THE COMPTROLLER OF THE CURRENCY
AS AMICUS CURIAE.**

✓ JOHN F. ANDERSON,
*Attorney for the
Comptroller of the Currency.*

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AS AMICUS CURIAE.**

Come now Preston Delano, Comptroller of the Currency of the United States, and, by leave of Court first had and obtained, respectfully submits his brief, as amicus curiae, in support of the appeal filed in this court by the Anderson National Bank in the above entitled cause.

I.

Foreword.

Appellants' "Statement as to Jurisdiction" covers this court's jurisdiction, the Federal questions raised, the State statutes involved and the citation of opinions below and consequently reference is here made to the same in the interest of avoiding repetition.

II.

Reasons Urged by the Comptroller of the Currency in Support of the Appeal of the Anderson National Bank.

The Court of Appeals of Kentucky has held in this case that a State may take inactive deposit accounts from a National bank without notice to the owners, suit or judicial decree. This decision involves substantial questions of public interest that directly affect the rights and deposit contract obligations of all National banks in Kentucky and indirectly affect all National banks wherever located because of the trend toward similar State legislation.

National banks are quasi-public institutions in *service* and are instrumentalities of the Federal Government in *origin*, notwithstanding the fact that they are private corporations in *ownership*. As of December 31, 1942, there were 5087 going National banks carrying deposits of \$50,648,816,000.00 (page 48, Annual Report of the Comptroller of the Currency to Congress, rendered January 6, 1943). The operations and functions of these banks, their maintenance as going institutions, and the protection of their deposits, are matters of general public interest and are of vital importance not only to the Federal Government in connection with its fiscal operations but to millions of citizens of this country who have depositary or other relations and dealings with them. The Comptroller of the Currency is charged by law with the examination and supervision of the operations and functions of these going banks and with the enforcement of the law pertaining thereto.

The Court of Appeals of Kentucky has decided a Federal question of substance in a way probably not in accord with the applicable decisions of this court in *National City Bank of New York v. People of the Philippine Islands*, (1937) 302 U. S. 651, and *First National Bank of San Jose v. State of California*, (1923) 262 U. S. 366. The decision of the court below appears to be in conflict in principle with the decisions of the United States Circuit Courts of Appeal in *Starr v. Schram*, (C. C. A. 6, 1941) 118 F. (2d) 548, certiorari denied 314 U. S. 695, and *In re Commercial National Bank of Philadelphia*, (C. C. A. 3, 1943) 134 F. (2d) 172, wherein Receivers of insolvent National banks, acting under the Comptroller's direction, successfully resisted attempts by the States of Michigan and Pennsylvania to seize inactive deposits in their banks.

III.

CONCLUSION.

The Comptroller of the Currency therefore earnestly urges this honorable court to review the decision of the Court of Appeals of Kentucky in the instant case.

Respectfully submitted,

JOHN F. ANDERSON,

*Attorney for Preston Delane,
Comptroller of the Currency.*

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OCTOBER TERM 1943.

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BASED UPON HIS INTEREST IN THIS CASE
FROM AN ADMINISTRATIVE STANDPOINT.**
—

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PRELIMINARY STATEMENT.

Comes now, as *amicus curiae*, Preston Delano, Comptroller of the Currency of the United States, the officer charged by law with the administration of the National Bank Act, and with the direction of the liquidation of insolvent na-

tional banks, to urge adherence to the doctrine of *First National Bank of San Jose v. State of California*, (1923) 262 U. S. 366, and the reversal of the decision of the court below.¹ The Kentucky statute under consideration is, by its terms, applicable to going national banks and to receivers of insolvent national banks,² and there are two such receiverships in Kentucky, The National Bank of Kentucky, Louisville, with liabilities of \$34,000,000 at suspension, and The Taylor National Bank of Campbellsville, with liabilities of \$1,500,000 at suspension.³ The appellant National Bank sues on behalf of itself and all others similarly situated. Section 20 of the Kentucky statute⁴ authorizes employees of the Department of Revenue of the State to examine all records of national banks, where there is reason to believe that there has been, or is, a failure to report property which should be reported under the provisions of the Act. We believe these features of the Kentucky Escheat Act to be in conflict with federal statutes and the decisions of this Court.

ARGUMENT.

In the case of *First National Bank of San Jose v. State of California*, (1923) 262 U. S. 366, (hereinafter referred to as the San Jose Case) this Court considered the applicability of an escheat statute of the State of California which, in its terms, purported to effect the escheat to the State, of deposits which had been inactive for a period of twenty years in national banks within the State. That statute, Section 1273 of California Code of Civil Procedure, is similar to the Kentucky Escheat Statute now under consideration. This Court concluded that the California statute was

¹ (R. 53, 89) Opinion, 293 Ky. 735, 170 S. W. (2d) 350, Final Decision, 294 Ky. 674, 172 S. W. (2d) 575.

² Section 2 (R. 19).

³ Annual report of the Comptroller of the Currency to Congress, Jan. 6, 1943, pp. 68, 73.

⁴ (R. 29, 30).

not applicable to national banks, and said, at pages 369, 370:

"Plainly, no State may prohibit national banks from accepting deposits or directly impair their efficiency in that regard. And we think, under circumstances like those here revealed, a State may not dissolve contracts of deposit even after twenty years and require national banks to pay to it the amounts then due; the settled principles stated above oppose such power.

Does the statute conflict with the letter or general object and purposes of the legislation by Congress? Obviously, it attempts to qualify in an unusual way agreements between national banks and their customers long understood to arise when the former receive deposits under their plainly granted powers. If California may thus interfere other States may do likewise; and, instead of twenty years, varying limitations may be prescribed—three years perhaps, or five, or ten, or fifteen. We cannot conclude that Congress intended to permit such results. They seem incompatible with the purpose to establish a system of governmental agencies specifically empowered and expected freely to accept deposits from customers irrespective of domicile with the commonly consequent duties and liabilities. The depositors of a national bank often live in many different States and countries; and certainly it would not be an immaterial thing if the deposits of all were subject to seizure by the State where the bank happened to be located. The success of almost all commercial banks depends upon their ability to obtain loans from depositors, and these might well hesitate to subject their funds to possible confiscation.

This Court has often pointed out the necessity for protecting federal agencies against interference by state legislation. The approved principle of *obsta principiis* should be adhered to. *McCulloch v. Maryland*, 4 Wheat. 316; *Osborn v. United States Bank*, 9 Wheat. 738; *Farmers' and Mechanics' National Bank v. Dearing*, *supra*; *California v. Central Pacific R. R. Co.*, 127 U. S. 1; *Davis v. Elmira Savings Bank*, *supra*; *Easton v. Iowa*, *supra*; *Corington v. First National Bank*, 198 U. S. 100; *Farmers and Mechanics Savings Bank v. Minnesota*, 232 U. S. 516; *Choctaw, Oklahoma &*

Gulf R. R. Co. v. Harrison, 235 U. S. 292; *Bank of California v. Richardson*, 248 U. S. 476.”

In the same year that the San Jose Case was decided by this Court, the case of *Security Savings Bank v. California*, (1923) 263 U. S. 282, was decided, in which it was held that the above-mentioned statute was constitutional with respect to its application to banks incorporated under the laws of California. But the conclusion reached in the San Jose Case, with respect to national banks, was emphasized in a footnote on page 284, which states:

“That the statutes are invalid as applied to National banks was settled in *First National Bank v. California*, 262 U. S. 366.”

This Court had occasion to again consider the doctrine of the San Jose Case in the case of *National City Bank v. Philippine Islands*, (1937) 302 U. S. 651, on a petition for certiorari to the Supreme Court of the Philippine Islands, involving a statute somewhat similar to the Kentucky statute now under consideration. In that case the Court of First Instance of Manila held that the statute was not applicable to national banks. The Supreme Court of the Philippine Islands reversed the lower court. This Court, in its *per curiam* decision, reversed the Supreme Court of the Philippine Islands, and affirmed the decision of the Court of First Instance of Manila, “upon the authority of” the San Jose Case and others,⁵ holding that the statute there in question did not apply to national banks. The pertinent portion of the opinion of the Court of First Instance of Manila will be found on page 170 of the record of that case before this court, wherein the lower court said:

“The sole question involved in this action is one of law, to wit: Whether unclaimed deposits made in a local branch of a national banking association may consti-

⁵ *Doménech v. National City Bank*, 294 U. S. 199, 204, 205; and *Posadas v. National City Bank*, 296 U. S. 497, 499, 500.

tutionally be escheated to the Philippine Government under the terms of Act 3936. It is universally held that national banking associations and their branches are instrumentalities of the United States Government and that the various states in the United States have no power to escheat deposits made therein. *First National Bank of San Jose v. California*, 67 L. Ed. 1030.

*** It is therefore the opinion of the court that this action is controlled by the decision of the United States Supreme Court in the case of *First National Bank of San Jose v. California*, 67 L. Ed. 1030, and that judgment with costs de officio, shall be entered for defendant, The National City Bank of New York, declaring the deposits, subject of this action, may not be escheated to the Philippine Government under Act 3936."

This court again cited the San Jose case in 1940 in *Colorado National Bank v. Bedford*, 310 U. S. 41; 50.

For more than twenty years the doctrine of the San Jose Case has been followed by federal and state courts alike. Our attention has not been called to one single case, decided during that time by any court, holding that a statute similar to the Kentucky Escheat Statute was applicable to national banks. As illustrating the reliance of the courts, both federal and state, upon the San Jose Case, we cite the following: In *Starr, Attorney General of Michigan v. O'Connor, Comptroller of the Currency, et al.* (C. C. A. 6, 1941) 118 F. (2d) 548, *certiorari denied*, *Starr v. Schram*, 314 U. S. 695, an attempt was made to require the Comptroller and the receiver of an insolvent national bank to pay over to the state authorities, liquidating dividends which might have been payable to owners of accounts, if they had established their claims in the manner prescribed by section 5236 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 194) appendix, p. 29. The Circuit Court of Appeals for the Sixth Circuit there held that the Michigan Escheat Statute, which was similar to the Kentucky statute with respect to dormant accounts, was not applicable to insolvent national banks. Since that date the Michigan act has

been further amended and a case involving the amended Act is now pending before the Circuit Court of Appeals for the Sixth Circuit. The same conclusion was reached in *In re Commercial National Bank of Philadelphia*, (D. C. E. D. Pa. 1942) 45 F. Supp. 482, affirmed per curiam (C. C. A. 3, 1943) 134 F. (2d) 172. In the case of *American National Bank of Nashville, et al. v. Clarke, Superintendent of Banks*, (Tenn. 1940) 135 W. (2d) 935, action was initiated by a going national bank and others, to test the applicability of the Tennessee statute to national banks. That statute is somewhat similar to the Kentucky Escheat Statute here involved. The Supreme Court of Tennessee followed the doctrine of the San Jose Case in holding that the statute was not applicable to national banks.

ADMINISTRATIVE ACTIVITY IN RELIANCE UPON THE SAN JOSE CASE.

The Comptroller of the Currency has consistently adhered to the doctrine of the San Jose Case, in answering inquiries concerning going national banks and in directing the conduct of his agents, the receivers of insolvent national banks. Copies of specimen letters relating to the Kentucky, Minnesota and Wisconsin Escheat Acts are set out in the appendix hereto, pp. 21-28. Millions of deposit contracts have been made with national banks since this Court's decision in the San Jose Case, and its affirmation in the cases of *Security Bank v. California*, *supra*, and *National City Bank v. Philippine Islands*, *supra*. In the last twenty years the Congress of the United States has not seen fit to change or modify the judicial construction of the national banking laws on this question established by the San Jose Case. During this time the National Bank Act has been amended and the Federal Deposit Insurance Corporation has been created. A great majority of state legislatures have, by their inactivity in this field, acquiesced in the pronouncement of that case. Since its decision, we believe that no state has been successful in seizing funds on deposit in going or in-

solvent national banks by virtue of state statutes vesting in the state authorities power to require payment of dormant accounts to state authorities, without judicial determination that said accounts have in fact escheated to the state.

In addition to the case at bar, similar actions are now pending against a going national bank in Minnesota and against the Receiver of an insolvent national bank in Michigan. Further proceedings in the two actions filed in Minnesota have been delayed pending a final decision in the case at bar. After the final decision in *Starr, Attorney General v. O'Connor, Comptroller of the Currency, et al., supra*, the Michigan statute was amended and a new effort was made to seize dormant deposits in the four hundred million dollar First National Bank-Detroit, insolvent. The contentions of the Comptroller of the Currency concerning the inapplicability of the amended Michigan Act to insolvent national banks were set out in his letter of January 15, 1942 to the Michigan Board of Escheats (App. p. 19). In the second Michigan case, *Rushlon, Attorney General v. Schram, Receiver of the First National Bank-Detroit*, now No. 9638 (C. C. A. 6th) awaiting argument in that court, the United States District Court for the Eastern District of Michigan held the amended Michigan statute inapplicable to insolvent national banks.

Under this Kentucky statute national banks and the receivers of insolvent national banks and perhaps other federal agencies, are required, under threat of penalty, to voluntarily turn over to the state, inactive deposit accounts, without suit, proof of death, intestacy and absence of heirs or next of kin, and without effective notice to the owners, hearing or judicial decree. In the recent case of *State v. Phoenix Savings Bank & Trust Co., et al.*, (1942) 132 P. (2d) 637, the Supreme Court of Arizona in holding a similar statute in that State unconstitutional, said at page 639:

"The question of the constitutionality of laws of this kind has been before the federal courts a number of

times and their general principles upheld, *but in each of such cases the statute involved permitted the state to escheat the deposit only when it provided for a judicial determination of the jurisdictional facts, which are (a) death, and (b) lack of heirs and intestacy, and gave proper opportunity for all persons interested in the deposit to appear and contest these two issues.* The leading case on the subject probably is *Security Savings Bank v. State of California*, 263 U. S. 282, 44 S. Ct. 108, 68 L. Ed. 301, 31 A. L. R. 391, wherein the necessary elements of such a statute are discussed." (Emphasis ours)

The court below is in accord when it says in its opinion (R. 57) " * * * —we would unhesitatingly say that there can be no escheat except pursuant to judicial determination made after legal notice," but it holds that nevertheless the State of Kentucky may take deposits from a National bank without suit, effective notice to the owner, hearing, or judicial decree. We submit that these views cannot be reconciled.

If such a statute is applicable to national banks or the receivers of insolvent national banks, the states might impose limitations and restrictions as various and numerous as the states. This Court said in this connection in its opinion in the *San Jose Case*, at page 370:

"If California may thus interfere other States may do likewise; and, instead of twenty years, varying limitations may be prescribed—three years perhaps, or five, or ten, or fifteen. We cannot conclude that Congress intended to permit such results."

As illustrative of the validity of that statement, inactive demand deposits would be seized from national banks and from receivers of insolvent national banks after seven years under the present Michigan statute, and after ten years under the Kentucky statute involved in the case at bar.

It is a fact that national banks regularly recognize judgments, and decrees of courts of competent jurisdiction, in probate, garnishment, and other proceedings transferring

ownership of deposit accounts to persons other than the bank record owners. In the case of *Security Savings Bank v. California*, *supra*, this Court recognized, at page 287, that the escheat procedure there involved resembled garnishment. But, as applied to dormant accounts in insolvent national banks, the procedure would have the effect of creating claims against the receivership fund which did not exist prior to the application of the statute, because of the failure of the owners of those accounts to prove claims in accordance with the requirements of U. S. C. title 12, sec. 194 (App. p. 29). The status of creditors of an insolvent national bank is similar to that of creditors of a bankrupt estate being administered under the federal bankruptcy act; as a condition precedent to sharing in the proceeds of liquidation they must prove their claims as prescribed by the Act. Whereas it has been held that a creditor of one who has properly proved his claim against a bankrupt can, with the consent of the bankruptcy court, bring garnishment proceedings against the trustee in bankruptcy to enforce the application of the dividends due the judgment debtor against the amount due on that judgment,⁶ we find no case in which garnishment proceedings were effective to give the judgment creditor a right to file a claim against the bankrupt estate which had not been filed by the judgment debtor. Yet if the Kentucky statute is held applicable to insolvent national banks, there would seem to be no cogent reason why it would not be likewise effective with respect to dormant obligations of bankrupts whose estates are being administered under the federal bankruptcy act, thus giving to the states the power to assert ownership and file claims on all obligations of bankrupts which have been inactive for the statutory period and on which claims have not otherwise been filed.

⁶ 2 Remington on Bankruptcy (4th ed. 1943 Supp.) 109; *In re Chakos*, (D. C. W. D. Wis. 1930) 36 F. (2d) 776; *National Automatic Tool Co. v. Goldie*, (D. C. Minn. 1939) 27 F. Supp. 399.

Depositors in banks are aware that statutes of limitations and laches are not valid defenses to their deposit claims. All banks are aware that many depositors intentionally permit certain of their accounts to remain inactive for periods of more than 7 years, 10 years, or even 20 years. There can be no valid presumption that such accounts have been abandoned. This feature is discussed in *State v. Cook*, (1931) 41 Ohio App. 149; 180 N. E. 554, wherein the court held invalid a similar Ohio statute; the court saying at page 558:

“But that is only a minor confusion. Note the definition of who are unknown depositors. Note the manner in which the Legislature seemed to appropriate and confiscate the property of a depositor. To illustrate: A person wishing to provide a sum for his future needs deposits a sum in a bank, intending to leave it there, to forget it, if you please, until some time in the future. He does not add to it; he does not draw the interest; he does not do a thing with it. He is in and out of the bank every day. He has other accounts that are workable and alive. The bank officials see him every day and know him and yet under this statute he is an ‘unknown depositor,’ and that deposit after seven years must be reported under a penalty of \$500 to the probate judge, and after eight years it must be transferred to the county treasury without the depositor’s knowledge, without his consent, and thenceforth, when he wants to reclaim it, the interest has ceased—he can only recover the sum which the bank turned over to the county treasury. In other words, his money is taken from a source where he thought it would be safe and drawing interest, a source upon which he relied for his future welfare, and, without his knowledge or consent, it is put in the hands of another custodian, which may or may not be good; but in any event, his right to interest, after the county treasury receives it, has been cut off.

We say that this violates the Constitution of the State of Ohio and the Constitution of the United States. It interferes with the freedom of contracting. It alters and changes the obligation of a contract. It violates the principle laid down in the Dartmouth College Case

and hundreds of cases since that time. Do not think that this is a fanciful notion, for I have in mind now an instance in which a party, wishing to provide a fund to take care of funeral expenses and such things at her decease, deposited a certain sum in one of the Cleveland banks some twenty years ago. The party has been in and out of that bank ever since, and has had other deposits in that bank, and yet, according to that statute, this person is an unknown depositor and the money could be taken and deposited with the county treasury and her interest in this fund would cease after it had been deposited.

I have two other cases in mind in this county where these very things are taking place. The depositors are no more unknown than any other depositor who goes in the bank every day. The Legislature cannot by a mere statute make white black or black white. Because the Legislature says that under a certain sunlight a black object shall be white, that does not make it white; it is black just the same, and so when it defines an unknown depositor it cannot make some one known unknown by a mere definition."

The court below said in its opinion (R. 58, 59):

"The mere taking away of the depositor's right of action against the bank constitutes no substantial deprivation of property when, in lieu thereof, he is afforded an action against the Commonwealth, the most perfect of all protection.

Nor does the requirement that the owner making claim must publish notice of his claim in the newspaper within fifteen days after filing it impose such a burden as to constitute a substantial deprivation."

"The average unclaimed and unproven account amounts to nine dollars." *Starr v. O'Connor, supra*, page 550. If this average is applicable to the appellant bank, which like all National banks is required to be a member of the Federal Deposit Insurance Corporation, the depositor or his personal representative can now expect to receive indefinitely his entire nine dollars, plus any interest accruing, from his local bank without undue formality. If the de-

posit is taken from the local bank under the Kentucky statute, interest stops, the sum of nine dollars is reduced by the cost of an expensive newspaper advertisement required to be published by the claimant, a proceeding to recover must be instituted at Frankfort and the depositor loses his right to claim five years after his deposit has been adjudged abandoned. Under the Michigan statute the depositor can recover, within a limited time only, the amount of the deposit, " * * * less any expense incurred by the State." *Starr v. O'Connor, supra*, page 551.

This court said, with reference to a state bank, in *Provident Institution for Savings v. Malone*, (1911) 221 U. S. 660, 665:

"Neither the charter nor the by-laws create anything in the nature of a tontine, under which, on dissolution of the corporation, the then depositors would receive the money of those absent and unknown."

This statement does not appear to be applicable to insolvent national banks. The rule as to such insolvent associations is substantially similar to the rule in bankruptcy, decedent's estates and equity receiverships where distribution is made only to those creditors who have proved claims. To quote from the opinion in *In re Commercial National Bank, supra*, pages 485, 486:

"The statute providing for the distribution of funds in the hands of the receiver of a national bank reads in part as follows: 'From time to time * * * the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.' 12 U. S. C. A. 194.

(5) In view of this statute, it is my opinion that the contract of deposit which is created when one deposits money in a national bank gives to such depositor a definite right to receive his ratable proportion of any unclaimed deposits in case of insolvency and liquidation of the bank. The statute also gives to the stockholders of the bank the right to receive whatever surplus may remain after payment in full of all proper claims.

(6) Principles of comity require that the national courts and the state courts should function as a harmonious and unified system in the administration of the law; but such considerations must yield to the paramount right of Congress to establish a uniform system of laws on any subject coming within the sphere of the delegated congressional functions, and to the resulting right of litigants to invoke the jurisdiction of the national courts in determining disputes arising thereunder. It has never been doubted that the liquidation of national banks is a proper subject for congressional action. If state laws of escheat were permitted to operate upon unclaimed funds in the hands of a receiver of a national bank, confusion and inequality of distribution would be the inevitable result. In states whose escheat laws throw out a dragnet within which to enmesh all the unclaimed funds in the receiver's hands, neither the bank's creditors who prove claims nor the stockholders would receive any benefit from the existence of unclaimed funds, however large. In other states whose escheat laws are less than all inclusive, creditors and stockholders would receive some benefit but not to the full extent of the fund, and in other states which have no special escheat statutes, creditors and stockholders of the bank would participate in the entire unclaimed funds. Clearly Congress did not contemplate that depositors and stockholders of national banks should be subject to any such discriminatory laws.

(7, 8) It must be remembered that the so-called "unclaimed" funds in the receiver's hands are not actually unclaimed within the true meaning of that word, unless the total moneys in his hands be more than enough to pay in full all creditors who have proved claims. The relation between a bank and its ordinary depositors is that of debtor and creditor. The books

of the bank may show credits to depositors who, after the bank is closed, fail to make any claim against the bank; but this fact does not necessarily result in unclaimed funds, nor does it serve to earmark particular funds of the bank as the property of such depositors. All the funds on deposit in the bank other than those held in trust belong to the bank, and upon insolvency are to be distributed ratably by the Comptroller to the creditors who prove their claims under the law. Only in case a surplus exists after proven claims have been paid in full may a receiver of a national bank be said to have unclaimed funds in his hands. As I have already pointed out, even this surplus must under the federal statutes be distributed to the stockholders, and is not subject to escheat at the hands of a state.

(9) The 1935 amendment to the Pennsylvania Escheat Statute providing for the escheat of unclaimed moneys in the hands of a receiver of a national bank contravenes the foregoing federal statute which provides for the ratable distribution thereof and is therefore invalid: *Star v. O'Connor*, supra. *First National Bank of San Jose v. State of California et al.*, 262 U. S. 366; 43 S. Ct. 602, 67 L. Ed. 1030."

In the case of *United States v. Klein, Escheator of Pennsylvania*, (1938) 303 U. S. 276, a fund belonging to unknown bondholders had been deposited in the District Court and later covered into the Treasury of the United States under Section 995 U. S. R. S. The Escheator of the Commonwealth of Pennsylvania, proceeding under a Pennsylvania statute, which authorized the escheat of moneys paid into court where the persons entitled to them have remained unknown for seven years, petitioned the District Court to declare an escheat of the fund. The Court dismissed the petition on the grounds that there had been no declaration of escheat and that it was without jurisdiction to decree an escheat. The District Court said (15 F. Supp. 473):

"Any claimant, however, would be required to show title before he could receive an award. This likewise includes Pennsylvania."

The Pennsylvania Escheat Act was then amended to give the Court of Common Pleas jurisdiction to decree such escheats. Appropriate procedure was then initiated by the Escheator of the Commonwealth in the Court of Common Pleas, and that court decreed the funds therein involved escheated to the state. That decree was affirmed by the Supreme Court of Pennsylvania and likewise affirmed by this Court. In its opinion this Court said, at page 282:

"The present decree for escheat of the fund is not founded on possession and does not disturb or purport to affect the Treasury's possession of the fund or the district court's authority over it. Nor could it do so.
** * ** At most the decree of the state court purports to be an adjudication upon the title of the unknown claimants in the fund by a proceeding in the nature of an inquest of office as in the case of escheated lands,
** * **" (Emphasis ours)

In accordance with the opinion of this Court, the Escheator of the Commonwealth of Pennsylvania applied to the United States District Court for an order for the payment of the fund to him and this was granted by the District Court and affirmed by the Circuit Court of Appeals for the Third Circuit, 106 F. (2d) 213, *certiorari denied*, (1939) 308 U. S. 618. It will be observed that in this case there was no seizure of funds or requirement that they be voluntarily delivered to the Escheator of the Commonwealth under threat of penalty for failure to comply, and there was a judicial determination of the escheat as a condition precedent to the payment of the funds to the Escheator.

It is believed that some parallel may be drawn between that case and certain aspects of the case at bar. Certainly as to insolvent national banks being administered by receivers appointed by the Comptroller of the Currency, the funds are as much in the possession of officers of the United States as in the case of *United States v. Klein, supra*. Section 5234 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 192) appendix 28 prescribes that the receiver

of an insolvent national bank shall pay over all money representing the proceeds of liquidation, ~~to the~~ Treasurer of the United States, subject to the order of the Comptroller, or that the Comptroller may deposit any such money in any regular government depository, or in any state or national bank in the city or town where the insolvent bank is located or in any city or town adjacent thereto, but shall require as security for such deposits that United States bonds or other satisfactory securities be deposited with the Treasurer of the United States. From these funds the Comptroller pays ratable dividends to those who have established their claims in accordance with the provisions of section 5236 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 194). (App. p. 29) All of the funds of an insolvent national bank, less administrative expenses, are owned by those who prove their claims in accordance with the provisions of that statute. As was said in the case of *In re Commercial National Bank*, *supra*, the contract of deposit with a national bank gives to each depositor a tentative right to receive a ratable proportion of any unclaimed deposits in the case of insolvency and liquidation of the bank; whereas that, of course, was not true with regard to the *unclaimed fund* involved in the case of *United States v. Klein*, *supra*.

Going national banks are instrumentalities of the federal government, created by Congress to enable it to exercise its fiscal powers and conduct its financial operations. They are supervised by federal authorities and their interests are, therefore, a particular concern of the federal government. *McCulloch v. Maryland*, (1819) 4 Wheat. 315; *Easton v. Iowa*, (1903) 188 U. S. 220; *Osborn v. United States Bank*, (1824) 9 Wheat. 738. The State of Kentucky should not be permitted to disturb any account in a national bank or the bank's control over it unless and until the State has obtained a valid judicial determination that the depositor has died intestate, without heirs or next of kin or other *bona fide* claimants to the fund. We, therefore, submit that such federal instrumentalities are not subject

to the summary procedure by which funds on deposit in dormant accounts would be seized under the Kentucky Escheat Act.

VISITORIAL PROVISIONS OF STATUTE CANNOT BE ENFORCED AGAINST NATIONAL BANKS.

Section 20 of the Kentucky statute (R. 29, 30) authorizing employees of the Kentucky Department of Revenue to examine the books and records of all banks is inapplicable to national banks. Section 5240 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 484) provides as follows:

"No [national] bank shall be subject to any visitorial powers other than such as are authorized by law, or vested in the courts of justice or such as shall be or shall have been exercised or directed by Congress, or by either House thereof or by any committee of Congress or of either House duly authorized." (Insert ours.)

No federal statute gives to state authorities visitorial powers over national banks. On the contrary, when the Congress saw fit to prescribe in section 11(k) of the Federal Reserve Act of 1913, as amended (U. S. C. title 12, sec. 248(k)) that state banking authorities may have access to reports of examination made by the Comptroller of the Currency, in so far as such reports relate to the trust departments of such banks, there was a specific proviso, as follows:

"* * * but nothing in this chapter shall be construed as authorizing the State banking authorities to examine the books, records, and assets of such bank."

In the case of *Guthrie v. Harkness*, (1905) 199 U. S. 148, the Court said, at page 158, regarding section 5240 of Rev. Stat., above quoted, that:

"* * * The right of visitation being a public right, existing in the State for the purpose of examining into the conduct of the corporation with a view to keeping

it within its legal powers, Congress had in mind in passing this section that in other sections of the law it had made full and complete provision for investigation by the Comptroller of the Currency and examiners appointed by him, and authorizing the appointment of a receiver, to take possession of the business with a view to winding up the affairs of the bank. It was the intention that this statute should contain a full code of provisions upon the subject, and that *no state law or enactment should undertake to exercise the right of visitation over a national corporation.* Except in so far as such corporation was liable to control in the courts of justice, this act was to be the full measure of visitorial power." (Emphasis ours)

CONCLUSION.

The law on this question in Kentucky, California, Michigan, Minnesota, Wisconsin and all other states will remain settled if this Court reverses the Court of Appeals of Kentucky and holds the Kentucky statute inapplicable to national banks "upon the authority of" the San Jose Case decided in 1923, and the Philippine Islands Case decided in 1937.

It is submitted that the decision of the Court of Appeals of Kentucky holding this Kentucky statute applicable to national banks should be reversed.

Respectfully submitted,

JOHN F. ANDERSON,
TREVOR V. ROBERTS,

*Attorneys for Preston Delano,
Comptroller of the Currency.*

APPENDIX.

TREASURY DEPARTMENT
OFFICE OF THE COMPTROLLER OF THE
CURRENCY

January 15, 1942

State Board of Escheats,
State of Michigan,
Lansing, Michigan.

Gentlemen:

Mr. B. C. Schram, Receiver of the First National Bank-Detroit, Detroit, Michigan has forwarded to this office a copy of the printed demand he received from your Board on December 30, 1941 that he file a report within 60 days of all unclaimed or uncalled for or abandoned monies, credits, securities, liquidated choses in action and property of any kind or nature, real, personal or mixed, held by him or under his control or in his possession, pursuant to Act 170 of the Public Acts of Michigan for 1941, effective June 16, 1941.

We consider this demand the assertion of a claim against this insolvent National bank to be disposed of under the following language in the opinion of the Supreme Court of the United States in *White v. Knox, Comptroller of the Currency*, 111 U. S. 784, 788:

"It was the duty of the Comptroller, if not satisfied of the correctness of the claim when presented, to disallow it, and, if an attempt was made to obtain its adjudication, to make such defence as in his judgment was proper."

It is the position of all insolvent National banks located in the State of Michigan that the Act of the Michigan Legislature approved June 16, 1941 is wholly inapplicable to the Receiverships in that it is in conflict with the provisions of the National Bank Act, a code by itself for the winding up of these institutions and that the Act is substantially a forfeiture statute rather than an escheat statute as was held by the United States Circuit Court of Appeals for the Sixth Circuit in *Starr v. Schram*, 118 Fed. (2nd) 548, certiorari denied December 22, 1941 wherein this and a simi-

lar Michigan statute were before the court. Accordingly all Receivers of insolvent National banks located in Michigan will respectfully decline to furnish reports of the character involved in the demand of your Board addressed to the Receivership of the First National Bank-Detroit, Detroit, Michigan.

In the event of a suit or suits against Receivers of insolvent National banks located in the State of Michigan to require compliance with this State statute all defenses available to both operating National banks and closed National banks will be interposed. The authorities relied on by our Receivers, in addition to *Starr v. Schram, supra*, and the decisions cited therein, will include *Cook County National Bank v. United States* (1882) 107 U. S. 445; *Davis v. Elmira Savings Bank* (1896) 161 U. S. 275; *Guthrie v. Harkness* (1905) 199 U. S. 148; *Easton v. Iowa* (1903) 188 U. S. 220; *Deitrick v. Greaney* (1940) 309 U. S. 190 and *American Surety Company v. Bethlehem National Bank*, (1941) 86 L. Ed. (Adv. Sheets) page 231.

As you know the insolvent National banks now in Receivership in Michigan have been in liquidation for nearly nine years. The final closing of some of these Receiverships has been withheld pending the outcome in *Starr v. Schram, supra*, which was finally disposed of on December 22, 1941. The Comptroller of the Currency considers it his duty to close all National bank Receiverships in Michigan at the earliest possible date thus granting final relief to the residents of Michigan who are depositors and creditors. Accordingly we will feel free to finally close all such Receiverships unless suit to establish the claims of your Board against any such Receivership is filed prior to March 16, 1942. If your Board decides to file further litigation which may be carried through to the Supreme Court of the United States we are hopeful that your action can be limited to the First National Bank-Detroit Receivership, plus possibly some few additional Receiverships, in that the amount involved in the smaller Receivership, even though it could be established that this State statute is applicable, would seem to be insufficient to require the depositors and creditors to assume the expense of keeping the Receiverships open with the consequent delay in final distribution.

Yours very truly,

(s) R. B. McCANDLESS
Deputy Comptroller

May 25, 1943

Mr. R. S. Beatty,
Chief National Bank Examiner,
Ninth Federal Reserve District,
223 Federal Office Building,
Minneapolis, Minnesota.

Dear Mr. Beatty:

Reference is made to your letter of May 5, 1943, in which you enclosed a copy of a Bill passed under date of April 24, 1943, by the Legislature of the State of Minnesota, pertaining to the escheat of bank deposits. Subsection 2 of Section 1 of the Act includes national banks in the definition of the term "banking institution." Since this Act will probably provoke inquiries on the part of national banks in the State of Minnesota as to whether or not they must comply with its provisions, you inquire as to the position you should take in this matter.

Historically, the term "escheat" had reference to the reversion of title to property to the sovereign power which granted the original estate, when the last owner died intestate, leaving no heirs or next of kin entitled to take his property. The term now is applied to cover both real and personal property. We have little doubt that if a person died intestate, leaving real or personal property but no heirs or next of kin, and an administrator was appointed for his estate, a national bank could be required to pay any funds on deposit in the name of said decedent to the administrator, despite the fact that after the payment of the debts and funeral expenses of the decedent the unclaimed balance would escheat to the state. However, a number of recent statutes, although labelled "Escheat Acts," are in effect forfeiture statutes, not predicated upon proof of death, intestacy and absence of heirs or next of kin. As to the applicability of such statutes to deposits in a national bank, we have serious doubt. A review of the recent Minnesota statute indicates that it is of the latter class. Section 2 prescribes that when any person abandons any funds or other property which has been left on deposit with any banking institution, the same shall escheat to and become the property of the State, and Section 3 provides, in substance, that where an account has been dormant for a period of twenty years, the owner is presumed to have abandoned the same.

The financial institutions are required to file annual statements with the Secretary of State, giving certain data regarding such dormant accounts. A procedure is prescribed whereby the Attorney General can initiate action to attach such funds and a further procedure for applying to a court for an order declaring that the funds have escheated to the State and directing the payment by the financial institutions to the Treasurer of the State of the sums in said dormant accounts, which funds will be credited to the general revenue fund. Any person claiming to be legally entitled to any of the funds or property involved and who did not appear in the action is given a period of ten years after the entry of judgment within which to sue the State to recover. If he establishes his right and obtains a judgment, the Attorney General is required to so advise the Legislature and request an appropriation for the payment of the judgment. After the lapse of ten years, however, the claimants' rights are terminated except in certain cases of legal disability.

It will be observed that the Act makes no reference to the death of the owners of said dormant accounts, intestacy or the absence of heirs. It would appear, therefore, to be a forfeiture or confiscatory statute based solely upon inactivity in the accounts for the prescribed number of years. This may be a valid and effective statute in so far as state banks are concerned, as was held in the case of *Security Bank v. California*, (1923) 263 U. S. 282, and to the extent of furnishing information regarding the dormant accounts the Act may be binding upon national banks. We are not sure of this point but in the case of *Territory of Alaska v. First National Bank of Fairbanks*, (C. C. A. 9th, 1927) 22 F. (2d) 377, a statute which required banks and other financial institutions to furnish information regarding dormant accounts was held to apply to national banks. It happens that the statute in that case more nearly resembled a pure escheat statute predicated upon proof of death of the owner intestate and without heirs. Therefore, the case is not authoritative with respect to the applicability of this phase of a forfeiture or confiscatory statute, to national banks. The case of *Territory of Alaska v. First National Bank*, (C. C. A. 9th, 1930) 41 F. (2d) 186, goes somewhat further than the first Alaska case in that it indicates that where the escheat of funds or property to the sovereign power is based upon presumptions of death, intestacy and absence of

heirs, resulting from the lapse of a long period of time without any claimants appearing, the statute will be applied to national banks.

In the case of *First National Bank v. California*, (1923) 262 U. S. 366, the Supreme Court of the United States flatly declared that a California statute, having the same objectives and somewhat similar characteristics as the Minnesota statute now under consideration, did not apply to national banks, and this case was followed by the Circuit Court of Appeals for the Sixth Circuit in the case of *Starr v. O'Connor*, (1941) 118 F. (2d) 548, where the applicability of a Michigan escheat statute to *insolvent* national banks was in issue, and by the Supreme Court of Tennessee in the case of *American National Bank of Nashville v. Clarke*, (1940) 135 S. W. (2d) 935. The Tennessee statute was similar to the Minnesota statute with respect to the principles involved, and the court pointed out that valid escheat laws of a state do apply to national banks; but that the Tennessee act really provided for the seizure and confiscation of funds on deposit in banking institutions in accounts which had been dormant for the prescribed number of years, and held that such statutes do not apply to national banks.

The position of this office, therefore, is that pure escheat statutes predicated upon proof of death, intestacy and absence of heirs do apply to national banks, but forfeiture or confiscation statutes, although they may apply to state banks, as indicated by the cases of *Provident Savings Institution v. Malone*, (1911) 221 U. S. 660, and *Cunnius v. Reading School District*, (1905) 198 U. S. 458, do not apply to national banks.

To what extent national banks can be called upon to furnish information regarding dormant accounts under the provisions of such forfeiture or confiscation statutes, is a matter of some uncertainty but it would seem that if the state is prohibited from availing itself of the benefit of the information furnished, there would be no point in submitting such data to the state authorities.

Whether or not national banks in the State of Minnesota should voluntarily submit to the provisions of the Act of April 24, 1943, is of course matter for the decision of the Boards of Directors of the respective banks. However we believe it would be helpful to have the question of the validity of this statute with respect to national banks definitely determined by judicial decision, and should any national

banks in that State wish to pursue that course we might suggest that in the case of *Starr v. O'Connor*, aforementioned, the Attorney General of the State of Michigan initiated an action under the Declaratory Judgment Act, and in the case of *Anderson National Bank v. H. Clyde Reeves*, the bank initiated the action under a Declaratory Judgment Act on behalf of itself and all others similarly situated. In the latter case, which is not yet reported, the Court of Appeals of Kentucky decided, under date of December 18, 1942, that the Act there involved did apply to national banks. We understand, however, that an attempt will be made to have this issue presented to the Supreme Court of the United States. We observe that Section 8 of the Minnesota statute prescribes penalties for failure to comply with the Act. Nevertheless there is a provision that no bank or financial institution shall become subject to the penalty for failure to comply, if such failure is based upon its contention, in good faith, that the provisions of the Act are invalid as applied to it. This would seem to be adequate to protect any national banks which wished to contest the applicability of this statute to national banks.

Please keep us informed of any further developments in this matter.

Very truly yours,

/s/ L. H. SEDLACEK,
Deputy Comptroller.

March 25, 1940

Mr. A. B. Faris,
National Bank Examiner,
Richmond, Kentucky.

Dear Mr. Faris:

Reference is made to your letter of March 8, 1940, in which you enclosed a copy of House Bill No. 321 recently passed by the Legislature of Kentucky, which provides, among other things, for the escheat of certain funds held by national banks. You desire an interpretation of the effects of this Bill in so far as national banks are concerned.

We have very carefully reviewed the copy of the Bill which you forwarded to us and have concluded that it comes within the reasoning of the Supreme Court of Tennessee in the recently decided case of *American National Bank of*

Nashville v. Clarke, (Tenn. 1940) 135 S. W. (2) 935, and the United States Supreme Court in *First National Bank of San Jose v. State of California*, (1923) 262 U. S. 366, and, therefore, would not be applicable to national banks doing business in the State of Kentucky. There are three provisions in House Bill No. 321 which are especially pertinent in regard to whether such Bill would be applicable to national banks. Sections 7 and 8 provide that after deposits have been dormant for a certain number of years, such deposits will be considered abandoned and that national banks, along with other banks of the Commonwealth, must report such deposits and pay them over to the Department of Revenue of that State. Section 20 of the Bill provides that the Department of Revenue of the Commonwealth, through its employees, are authorized to examine all records of state and national banks where there is reason to believe there has been or is a failure to report deposits which should be reported under the provisions of this Bill.

These provisions are almost identical with the provisions contained in the Act of the State of Tennessee which was considered by the court in *American National Bank of Nashville v. Clarke*, *supra*. The court held that the Act was an unwarranted interference with the business of a national bank.

In view of the manner in which the Kentucky statute is drafted, there is no possibility of bringing it within the category of escheat acts which are applicable to national banks, as for instance that particular statute which was considered in *Territory of Alaska v. First National Bank*, (C. C. A. 9th, 1927) 22 F. (2d) 377. The Kentucky Bill is especially inapplicable to national banks since it purports to grant to state authorities the right to examine and inspect the books and records of national banks. You are aware of course that this is specifically prohibited by the National Bank Act, and, therefore, the State statute must be considered void in so far as it conflicts with Federal legislation. See *Davis v. Elmira Savings Bank*, (1896) 161 U. S. 275, 283, 288, and 289; *Farmers' and Mechanics' National Bank v. Dearing*, (1875) 91 U. S. 29, 33 and 34; *Easton v. Iowa*, (1903) 188 U. S. 220, 229.

In addition, this statute purports to interfere with the ratable distribution mandate of the National Bank Act with regard to the recognition of claims against insolvent national banks and the payment of dividends thereon, and,

therefore, the provisions of the Kentucky Bill in that regard must be considered as void. See *People ex rel. Barrett v. Union Bank & Trust Company*, (Ill. 1935) 199 N. E. 272; *Spradlin v. Royal Mfg. Co.*, (C. C. A. 4th, 1934) 73 F. (2d) 776; and *Jennings v. U. S. F. & G. Co.*, (1935) 294 U. S. 216.

Since the requirements of the Bill relative to the filing of reports with the Department of Revenue is an integral part of the Bill and is obviously only a means of carrying out the provisions of the Bill, we believe that those provisions are likewise inapplicable to national banks.

It, of course, must be realized that the conclusions set forth in this letter merely represent the view of this office and that the responsibility for failing to comply with the provisions of the state statute must be upon the board of directors of each particular national bank.

However, in case any of the counsel for any particular bank considers the question here involved, they should give consideration to the following additional authorities precedent and con: *National City Bank v. Philippine Islands*, (1937) 302 U. S. 651; *Territory of Alaska v. First National Bank* (C. C. A. 9th, 1930) 41 F. (2d) 186; *Braun v. McPherson* (Mich. 1936) 269 N. W. 211; *Starr v. Schram*, (E. D. Mich. 1938) 24 F. Supp. 888 (which is the subject of appeal at the present time); *In re Anderson's Estate*, (Wash., 1936) 61 P. (2d) 132; and *In Re Liquidation of Farmers State Bank of Ames*, (1937) 84 Okla. App. 410.

Very truly yours,

/s/ E. H. GOUGH,
Deputy Comptroller.

February 3, 1942.

Mr. B. C. Bunker,
c/o First National Bank,
Hudson, Wisconsin.

Dear Mr. Bunker:

Reference is made to your letter of January 9, 1942, regarding the applicability to a national bank of a statute of the State of Wisconsin dealing with the escheat of deposits. You refer to the statute as (Sec. 220.25) and you explain that the attorneys for the Wisconsin Bankers Association

at Milwaukee have rendered an opinion that the statute does not apply to national banks. However, in answer to a letter to the Secretary of State, you received a reply from the Attorney General of Wisconsin, in which you were advised that it was his opinion that Sec. 220.25 applies to national banks as well as state banks. He informed you at that time that there was an appeal pending before the Supreme Court of the State in which the validity of this statute was in issue and that as soon as that appeal was decided the State would no doubt commence an action against one of the larger national banks. You have certain dormant accounts which might be subject to the statute if applicable to national banks but you do not wish to pay these funds to the wrong person nor subject your bank to double payment. You therefore solicit the advice of this office.

Any opinion of this office relative to the applicability to national banks of a state escheat law cannot be considered as conclusive or directory. The course which a national bank wishes to pursue with respect to any such statute is a matter for the determination of the directors of the bank under the guidance of its own counsel. However, for your information, the only case we have been able to find based upon the section to which you refer is the case of *State v. Marshall & Illsley Bank of Milwaukee*, (1940) 291 N. W. 361. There the Act is referred to as "St. 1939, § 220.25 (1, 2)". You will note in that case that the action involved a state bank and the Supreme Court of Wisconsin held that the Act did not violate the Constitution of the United States for want of due process as to deposits and as to the other items included nor did it impair the obligation of contracts. The Court stated that its decision was controlled by the case of *Security Savings Bank v. California*, (1923) 263 U. S. 282, wherein a statute of California of somewhat the same nature was involved. There the Supreme Court of the United States held that the California statute was not in violation of either the due process or the impairment of contract clauses of the Constitution of the United States. However in the case of *First National Bank of San Jose v. California*, (1923) 262 U. S. 366, that same statute was held not to be applicable to national banks located in the State of California because it impaired the efficiency of national banks to discharge the duties for which they were created and was an attempt to qualify in an unusual way contracts entered into by national banks with their depositors.

Since we are not sure when you received the opinion from the Attorney General we are uncertain as to whether the case decided by the Supreme Court of your State in 1940 aforementioned was the one he had in mind or whether since the decision in the case of *State v. Marshall & Illsley Bank of Milwaukee* there has been a further amendment to the above-mentioned statute which has given rise to another case now pending before the Supreme Court of your State. Any such amendment of course may make a material difference as to the validity of the statute as applied to national banks and without knowing its provisions this office can express no opinion with respect thereto. If you wish us to give the matter further consideration we suggest that you send us a copy of the opinion of the Supreme Court of your State on the new case, if there is one, a copy of the current escheat statute, copies of the opinion of the attorneys representing the Wisconsin Bankers Association, and the opinion of the Attorney General of your State, to which you refer.

Yours very truly,

/s/ R. B. McCANDLESS,
Deputy Comptroller.

TITLE 12 U. S. C.

192. *Default in payment of circulating notes.*

On becoming satisfied, as specified in sections 131 and 132 of this title, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the comptroller.

and also make report to the comptroller of all his acts and proceedings.

Provided, That the comptroller may, if he deems proper, deposit any of the money so made in any regular Government depository, or in any State or National bank either of the city or town in which the insolvent bank was located, or of a city or town as adjacent thereto as practicable; if such deposit is made he shall require the depository to deposit United States bonds or other satisfactory securities with the Treasurer of the United States for the safe-keeping and prompt payment of the money so deposited: *Provided*, That no security in the form of deposit of United States bonds, or otherwise, shall be required in the case of such parts of the deposits as are insured under section 264 of this title. Such depository shall pay upon such money interest at such rate as the comptroller may prescribe, not less, however, than 2 per centum per annum upon the average monthly amount of such deposits. (R. S. 5234; May 15, 1916, c. 121, 39 Stat. 121; Aug. 23, 1935, c. 614, 339, 49 Stat. 721.)

194. *Dividends on adjusted claims; distribution of assets.*

From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association or their legal representatives, in proportion to the stock by them respectively held. (R. S. 5236.)

Supreme Court of the United States

October Term, 1943.

No. 154

Office, Supreme Court, U. S.

NOV 30 1943

CHARLES ELMORE CROPLEY
CLERK

ANDERSON NATIONAL BANK,

Suing on Behalf of Itself and All Others Similarly Situated,
Appellant,

vs.

H. CLYDE REEVES, Individually and as Commissioner of
Revenue of the State of Kentucky and a Member of the
Kentucky Tax Commission,

C. M. C. PORTER, and

R. L. MCFARLAND, Individually and as Members of the
Kentucky Tax Commission,

HUBERT MEREDITH, Individually and as Attorney General
of the State of Kentucky,

Respondents.

Appeal from the Court of Appeals of the State of Kentucky.

BRIEF AND ARGUMENT

FILED BY THE STATE OF MINNESOTA AS *AMICUS*
CURIAE, THE STATE OF WISCONSIN JOINING.

J. A. A. BURNQUIST,

Attorney General,

WM. C. GREEN,

Assistant Attorney General,

Attorneys for the State of

Minnesota as *Amicus Curiae*.

JOHN E. MARTIN,

Attorney General,

Attorney for the State of Wis-

consin, Joining in the Brief

Amicus Curiae.

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No. 154

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of the State of Kentucky,

Respondents.

Appeal from the Court of Appeals of the State of Kentucky.

BRIEF AND ARGUMENT

FILED BY THE STATE OF MINNESOTA AS AMICUS
CURIAE, THE STATE OF WISCONSIN JOINING.

PRELIMINARY STATEMENT.

This brief is submitted on behalf of the State of Minnesota in support of the position of respondents. The State of Wisconsin, by its Attorney General, joins in the brief.

The State of Minnesota has a special interest in the questions involved because of questions which have been raised by national banks in connection with the enforcement of Laws of Minnesota for 1943, Chapter 620, a copy of which is annexed to this brief as Appendix "A".

Wisconsin Statutes 1941, Section 220.25, a copy of which is annexed hereto as Appendix "B", has been sustained as to state banks by the Supreme Court of Wisconsin in *State v. Marshall & Illsley Bank*, 234 Wis. 375, 291 N. W. 361, but the question of its validity as applied to national banks has not been determined.

While these statutes differ in certain particulars from the 1940 Kentucky Act as amended¹, the fundamental propositions involved in all are the same.

ARGUMENT.

Point I.

**First National Bank of San Jose v. California Is Inconsistent with Prior and Subsequent Decisions of
This Court and Should Be Overruled.**

We respectfully submit that *First National Bank of San Jose v. State of California*, 262 U. S. 366 (hereinafter

¹Acts 1940, Ch. 79, p. 333; Ky. St. 1605a-1622-1, both inclusive, May, 1940, Supp. to Carroll's Kentucky Statutes, 1936, as amended by Acts 1942, Ch. 156, p. 637.

referred to as the "*San Jose case*"), should be overruled as inconsistent with the prior and subsequent decisions of this Court, in so far as it holds that a state statute providing for the transfer of unclaimed bank deposits to the state, and under certain conditions for their escheat, otherwise valid and constitutional, is invalid as applied to national banks.

The *San Jose case* involved the application of Section 1273, California Code of Civil Procedure, to national banks. This section reads:

"All amounts of money heretofore or hereafter deposited with any bank to the credit of depositors who have not made a deposit on said account or withdrawn any part thereof or the interest and which shall have remained unclaimed for more than twenty years after the date of such deposit, or withdrawal of any part of principal or interest, and where neither the depositor or any claimant has filed any notice with such bank showing his or her present residence, shall, with the increase and proceeds thereof, escheat to the state."

The statute further directs the attorney general to institute actions against banks and depositors to recover all such amounts and provides that, if it be determined that the moneys deposited in any defendant bank or banks are unclaimed, then the court must render judgment in favor of the state, declaring that said moneys have escheated to the state and commanding the bank or banks forthwith to deposit the moneys with the state treasurer, to be handled in the same manner as is provided by law in the case of other escheated property.

Judgment having been given for the state against the plaintiff in error, a national bank, for the amounts credited

upon its books to a depositor for more than 20 years, this Court was asked to hold that, so construed and applied, Section 1273 conflicted with the laws of the United States touching national banks and was, therefore, invalid. This Court so held.

In support of the opinion there were cited, among other cases, *McCulloch v. Maryland*, 4 Wheat. 316, and *Osborn v. United States Bank*, 9 Wheat. 738.

The decision in *McCulloch v. Maryland*, 17 U. S. (4 Wheat.) 315, sustaining the act of the 10th April, 1816, incorporating the Bank of the United States, was bottomed on the proposition that the Bank of the United States was an instrument of government for fiscal purposes, and denied the right of taxation by the state on the ground that such a right might be used in such cases so as to destroy the instrumentalities by which the government proposed to effect its lawful purposes in the states.

In *Osborn v. Bank*, 22 U. S. (9 Wheat.) 737, it was argued for appellants that the law was unconstitutional because the corporation had been originated for the management of an individual concern, to be founded on contract between individuals, having private trade and private profit for its great end and principal object. Chief Justice Marshall conceded "That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government," following this by the statement:

"The whole opinion of the court, in the case of *McCulloch v. State of Maryland*, is founded on, and sustained by, the idea that the bank is an instrument which is 'necessary and proper for carrying into effect the powers vested in the government of the United States.' "

Then, defending the right of Congress to protect the bank in its private business, the Chief Justice argued that it could not effect the object of carrying on the fiscal operations of the government "unless it be endowed with that faculty of lending and dealing in money, which is conferred by its charter." From this premise he concluded that to tax the faculties, trade, and occupation of the bank would be to tax the bank itself and, viewing taxation as a possible method of destruction, concluded that, "To destroy or preserve the one, is to destroy or preserve the other."

National Bank v. Commonwealth, 76 U. S. (9 Wall.) 353, entirely overlooked in the *San Jose case* but cited with approval and followed by this Court in *Colorado v. Bedford*, 310 U. S. 41, 51, clarified any doubts that may have existed as to the powers of a state with reference to the operations of national banks. Because of the succinct statement by Mr. Justice Miller, we avoid a lengthy argument by a brief quotation. It will be kept in mind that the law of Kentucky there involved not only imposed a tax upon the shares of a national bank but compelled the payment of the tax levied on the shares by the bank. The second question, as stated in the opinion, was:

"If it is found to be a tax on the shares, can the bank be compelled to pay the tax thus levied on the shares by the State?"

Mr. Justice Miller said:

"But it is argued that the banks, being instrumentalities of the Federal government, by which some of its important operations are conducted, cannot be subjected to such State legislation. It is certainly true

that the Bank of the United States and its capital were held to be exempt from State taxation on the ground here stated, and this principle, laid down in the case of *McCulloch v. The State of Maryland*, has been repeatedly affirmed by the court. But the doctrine has its foundation in the proposition, that the right of taxation may be so used in such cases as to destroy the instrumentalities by which the government proposes to effect its lawful purposes in the States, and it certainly cannot be maintained that banks or other corporations or instrumentalities of the government are to be wholly withdrawn from the operation of State legislation. * * * The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the Federal government are only exempted from State legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States. The salary of a Federal officer may not be taxed; he may be exempted from any personal service which interferes with the discharge of his official duties, because those exemptions are essential to enable him to perform those duties. But he is subject to all the laws of the State which affect his family or social relations, or his property, and he is liable to punishment for crime, though that punishment be imprisonment or death. So of the banks. They are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the state than of the nation. All their contracts are governed and con-

strued by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. *It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.*² We do not see the remotest probability of this, in their being required to pay the tax which their stockholders owe to the State for the shares of their capital stock, when the law of the Federal government authorizes the tax."

See also:

Clement National Bank v. Vermont, 231 U. S. 120;

McClellan v. Chipman, 164 U. S. 347;

Waite v. Dowley, 94 U. S. 527.

The cases following the *San Jose* case hold to the same rule:

Des Moines Bank v. Fairweather, 263 U. S. 103, 111;

First National Bank v. Missouri, 263 U. S. 640, 656.

Colorado National Bank of Denver v. Bedford, 310 U. S. 41 (1940), involved the validity of the Public Revenue Service Tax Act of Colorado.³

One section of this act imposed upon certain services rendered by banks and other financial institutions a percentage tax based upon the value of the services rendered or performed. The person rendering the services was made liable and responsible for the entire amount, being required, as far as practicable, to add the tax imposed to the value of services or charges. Among the services included was that of furnishing of safety vaults by banks. One of

²All emphasis in this brief supplied unless otherwise noted.

³Session Laws of Colorado, 1937, Ch. 240, p. 1144.

the claims of the bank in that case was that the tax was invalid because laid upon the bank as an instrumentality of government. This Court held, following *National Bank v. Commonwealth*, 76 U. S. (9 Wall.) 353, that, since the user was the actual taxpayer and the tax being a permissible tax on the customers of the bank, the statutory provisions requiring collection and remission of the taxes did not impose an unconstitutional burden on a federal instrumentality.

The opinion in the *San Jose case* appears to proceed upon the theory that under acts such as those under consideration the state violates rights of both bank and depositor. This was neither the prior nor the subsequent holding of this Court.

In *Provident Institution for Savings v. Malone*, 221 U. S. 660, this Court, passing on the Massachusetts law as to savings banks, still in effect⁴, which requires a savings bank to pay over to the state as a depository (with a right on the part of the depositors to reclaim them) deposits which have remained inactive or unclaimed for 30 years, or where the claimant is unknown or the depositor cannot be found, held that the contract of deposit does not give the bank a tontine right to retain the money in the event that it is not called for by the depositor; it gives the bank merely the right to use the depositor's money until called for by him or some other person duly authorized, and, if the deposit is turned over to the state in obedience to a valid law, the obligation of the state to the depositor is discharged.

We are then led to *Security Savings Bank v. State of*

⁴Mass. Gen'l Laws, 1932, Ch. 168, Sec. 42.

California, 263 U. S. 282, decided within six months after the *San Jose* case and involving the same statute there considered, but considering it as applied to state banks. In the *Security Savings Bank* case this Court held that savings deposits are intangible property, subject to the dominion of the state; that no right of the bank under the contract clause of the Constitution or the due process clause of the Fourteenth Amendment was violated by the act; that there was proper jurisdiction over the deposit and proper notice. The Court said:

"It is no concern of the bank's whether the State receives the money merely as depositary or takes it as an escheat."

Certainly, a national bank is no more immune to state legislation than are the federal courts and the United States Treasury. In *U. S. v. Klein, Escheator of Pennsylvania*, 303 U. S. 276, this Court had under consideration a law of Pennsylvania⁵, conferring upon the Court of Common Pleas jurisdiction to decree an escheat of moneys deposited in the custody or under the control of any court of the United States within the commonwealth. This statute provided that such funds should be escheatable if the owner, beneficial owner, or person entitled thereto had been, or his whereabouts had been, unknown for seven years. A suit having been brought to have declared an escheat of certain moneys paid into the registry of the federal court and thereafter deposited in the Treasury of the United States, and a decree entered declaring that the fund had escheated to the commonwealth and directing the escheator to apply to the federal district court for an order that the

⁵Apt of June 28, 1935, P. L. 475.

moneys be paid to him as escheator, which was affirmed by the State Supreme Court⁶, the Government appealed, claiming that the decree was an unconstitutional interference with a court of the United States, an invasion of its sovereignty, and an attempt, void under the Fourteenth Amendment, to exercise jurisdiction over the absent bondholders and the moneys, neither of which was shown to be within the state.

This Court affirmed, saying:

"The present decree for escheat of the fund is not founded on possession and does not disturb or purport to affect the Treasury's possession of the fund or the district court's authority over it. * * * At most the decree of the state court purports to be an adjudication upon the title of the unknown claimants in the fund by a proceeding in the nature of an inquest of office as in the case of escheated lands, * * * and to confirm the authority of appellee to make claim to the moneys."

The *Sau Jose case* starts with this premise:

"These (national) banks are instrumentalities of the Federal Government. Their contracts and dealings are subject to the operation of general and indiscriminating state laws which do not conflict with the letter or the general object and purposes of congressional legislation. But any attempt by a State to define their duties or control the conduct of their affairs is void whenever it conflicts with the laws of the United States or frustrates the purposes of the national legislation or impairs the efficiency of the bank to *discharge the duties for which it was created.*" (pp. 368-369.)

There can be no claim that the California Act there involved, the Kentucky Act here involved, the Minnesota Act, a copy of which is attached to this brief, or any of the other so-called escheat acts referred to in the various cases cited in all the briefs, which include within their terms national banks, are not general and indiscriminating, because in every instance they include as well state banks. They do not conflict with the laws of the United States. They cannot be said to frustrate the purposes of the national legislation stated by this Court in all the cases from *McCulloch v. Maryland* down.

"Even in the case of agencies created or appointed to do the government's work we have been slow to infer an immunity which Congress has not granted and which Congressional policy does not require." *Penn Dairies v. Milk Control Comm'n*, 318 U. S. 261, 271.

The whole basis of the decision is that such laws impair the efficiency of the bank to discharge the duties for which it was created.

There is nothing sacrosanct about a national bank when engaged in the business of accepting deposits. Depositors in a national bank have no greater rights than depositors in a state bank. Every day deposits in national banks are garnished and attached. They are seized by the taxing authorities, both state and federal. They are delivered over to executors and administrators under orders of probate courts. They are delivered to heirs of depositors under decrees of distribution. Certainly, if a tax were owing to the State of California or to the State of Kentucky or to the State of Minnesota by a depositor in a national bank in any one of those states, no claim could be made by the

bank that the taxing authorities could not levy on the deposit. As stated in *National Bank v. Commonwealth*, supra:

"If the State of Kentucky had a claim against a stockholder of the bank who was a non-resident of the State, it could undoubtedly collect the claim by legal proceeding, in which the bank could be attached or garnisheed, and made to pay the debt out of the means of its shareholder under its control. This is, in effect, what the law of Kentucky does in regard to the tax of the State on the bank shares. It is no greater interference with the functions of the bank than any other legal proceeding to which its business operations may subject it, and it in no manner hinders it from performing all the duties of financial agent of the government."

Every time a deposit is transferred from the depositor to another person by operation of law there is a dissolution, or partial dissolution, of the contract of deposit. As to the statement that, when a state demands a deposit from a national bank under a claim of ownership by virtue of a statute relating to abandonment, there is a qualification in an unusual way of an agreement between that bank and its customer, long understood to have arisen when the bank received the deposit under its plainly granted powers, we ask whether there is a qualification in an unusual way of such an agreement when the account of a depositor in a national bank is attached or garnished by a creditor or is seized by a taxing authority or is demanded by an executor, an administrator, or an heir, acting pursuant to an order or decree of probate court. What different situation arises when a state, by virtue of a statute which has been held by

this Court in *Security Savings Bank v. California*, 263 U. S. 282, to violate no right of the bank under the contract clause of the Constitution or the due process clause of the Fourteenth Amendment, claims the right to possession or ownership of a deposit and makes a demand upon the national bank for that deposit? Conceding that the deposit has created a relationship between the bank and the depositor where the bank is the debtor and the depositor is the creditor, what right has the debtor to say that it will pay its debt only to the original creditor, regardless of any transfer of the rights of that creditor which may have been made by operation of law?

Is it necessary, in order that a national bank may perform its governmental functions as a fiscal agent for the government, that it keep for itself all abandoned deposits?

If the estate of an individual is probated, actual death having been established but the estate of the individual having been decreed to the state under escheat laws for want of heirs, and the probate court makes a decree of distribution assigning the estate of the individual to the state and in that estate is included a deposit in a national bank, may the national bank say that there is an unusual qualification of the agreement of deposit made with the deceased because of the fact that the state has secured title to the deposit by reason of an escheat law and that, therefore, it will not pay over the funds represented by the deposit?

As to the statement in the opinion that, "If California may thus interfere other States may do likewise; and, instead of twenty years, varying limitations may be prescribed—three years perhaps, or five, or ten; or fifteen," would it be seriously contended by anyone that, if a state

were to enact legislation providing for the transfer of deposits to it because they had not been dealt with for three years, such a statute would be sustained under the due process clause of the Constitution by any state court, to say nothing of this Court?

As to the argument that "The success of almost all commercial banks depends upon their ability to obtain loans from depositors, and these might well hesitate to subject their funds to possible confiscation," there are three answers. (a) The argument would apply as well to state banks as to national banks, and, therefore, no escheats law could be upheld. (b) Any individual making a deposit in a bank does so with the knowledge that that deposit will be subject to any and all lawful proceedings. (c) Any depositor who fails to deal with his deposit for a sufficient length of time to create a presumption that he has abandoned it has no more cause for complaint if possession or title be taken by the state in proceedings affording him due process of law than has a creditor who fails to enforce his rights within a period of limitations or within such a period that he may claim freedom from the defense of laches.

The *San Jose* case cannot be reconciled with *National Bank v. Commonwealth*, *Security Bank v. California*, *Colorado Bank v. Bedford*, *Provident Institution for Savings v. Malone*, *United States v. Klein*, or *First National Bank v. Missouri*. It is an orphan, without posterity. It has received no approval by this Court except by mention in a footnote to *Security Bank v. California* and by being followed without comment in the per curiam decision in *National City Bank of New York v. Philippine Islands*,

302 U. S. 651. Until it is overruled, however, it will continue to influence the courts as is evidenced by the decisions in *American National Bank of Nashville v. Clarke*, 175 Tenn. 480, 135 S. W. (2d) 935, and *Starr v. O'Connor* (C. C. A. 6), 118 Fed. (2d) 548.

Point II.

Requiring Reports by National Banks of Dormant Accounts Constitutes No Interference with Their Functions as Governmental Agencies.

This point should require no additional argument.

Waite v. Dowley, 94 U. S. 527;

Colorado National Bank of Denver v. Bedford, 310 U. S. 41.

Point III.

Laws Providing for Transfer of Custody and Escheat of Abandoned Bank Deposits Are Not Unusual.*

The proposition that there is no qualification in an unusual way of an agreement between a bank and its depositor when, by virtue of statutory authority, the state takes possession of or acquires title to the depositor's abandoned bank account finds ample support in the fact that many states have over a long period of years enacted statutes providing for the transfer of custody, and in a number of cases for the escheat, of bank deposits abandoned for varying terms of years. The statutes cited *infra* deal with deposits in active banks and do not include the many statutes which provide for transfer to the state of

unclaimed deposits in the hands of liquidators.

Alaska: Comp. Laws 1933, §2903 as Am. by Laws 1939, Ch. 27.*

Arizona: Arizona Code Ann. 1939, §§ 51-517.*

California: Stats. 1915, pp. 107, 1106, and Code Civ. Procedure, §1273.*

Connecticut: Pub. Acts 1931, Ch. 200; Supp. Conn. Gen'l Stats. 1931-33-35, §1479 *et seq.* as Am. by Pub. Acts 1941, Ch. 101, §1.*

Kentucky: See citations *supra*.

Louisiana: Louisiana Gen'l Stats. Dart, §§534, 692.

Massachusetts: Gen'l Laws 1932, Ch. 168, §42.

Michigan: Comp. Laws 1929, §§13459-13477 as Am. 1939 Pub. Acts No. 299.*

Minnesota: See Appendix "A".

New Hampshire: Revised Laws 1942, Ch. 309, §§25-31.

New York: McKinney's Consol. Laws of New York—
Banking Law, §§ 2(23); 256-257.

Oregon: Code 1930, Vol. 1, §§ 11-1212 to 11-1216.*

Pennsylvania: Purdon's Pa. Stat. Ann., §282 as Am. by Act of 1935, May 16, P. L. 195, §1.*

Vermont: Pub. Laws 1933, §§6728-6738.

Wisconsin: See Appendix "B".

(* Includes all banks.)

CONCLUSION.

It is respectfully submitted that the decision of the Court of Appeals of Kentucky should be affirmed.

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JOHN E. MARTIN,

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consin, Joining in the Brief
Amicus Curiae.

APPENDIX "A"**Minnesota Bank Deposit Escheats Statute.
Chapter 620****A BILL**

FOR AN ACT relating to funds or other property left on deposit, or otherwise, with banking and financial institutions, and abandoned; and to pay refunds claimed pursuant thereto, and repealing Laws 1937, Chapter 358, being Mason's supplement 1940, Sections 7658-21 to 7658-27.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. Subdivision 1. The following words, terms, and phrases shall, for the purposes of this Act, be given the meanings subjoined to them.

Subdivision 2. "Banking institution" means any state bank, national bank, savings bank, or trust company, within this state.

Subdivision 3. "Financial institution" means any savings, building, and loan association organized under the laws of this state, federal savings and loan association, credit union, industrial loan and thrift company, or other financial institution within this state.

Subdivision 4. "Person" means a partnership, association, or corporation, as well as a natural person.

Subdivision 5. "The state" means the State of Minnesota.

Subdivision 6. "Deposit" and "funds or other property", when such funds or other property are referred to as having been left on deposit or held on deposit, each

means the unpaid balance of money or its equivalent received by a banking institution or financial institution in the usual course of business and for which it has given or is obligated to give credit to a commercial, checking, savings, time or thrift account, or which is evidenced by its certificate of deposit, passbook, share certificate, certificate of indebtedness, or other like certificate.

Sec. 2. When any person abandons any funds or other property which have been left on deposit, or otherwise, with any banking institutions or financial institution, the same shall, with the increase and proceeds thereof, escheat to and become the property of the state.

Sec. 3. Any person who has left on deposit, or otherwise, with any banking institution or financial institution, any funds or other property, and has not dealt therewith for a period of 20 years by adding thereto, withdrawing therefrom, or asserting any claim thereto, is presumed to have abandoned the same.

Sec. 4. Subdivision 1. (1) It shall be the duty of the cashier or managing officer of every banking institution and financial institution, which on June 30, 1943, holds on deposit, or otherwise, any funds or other property which have been left with it on deposit, or otherwise, and have not been dealt with for a period of 20 years by additions thereto, withdrawals therefrom, or the assertion of any claim thereto, to file with the secretary of state, within thirty days thereafter, a statement, in duplicate, reporting the same, stating the names of the persons shown by the records of said banking institution or financial institution to have been the owners or depositors of such funds or other property; the last known place of residence or busi-

ness of each, and in each instance, the kind of funds or other property, and how held, the amount of the deposit, including interest if any, and the value and nature of the property otherwise held, including interest or other increase or proceeds thereof, if any. This statement shall be subscribed by the officer making it, and shall be verified by his affidavit that it is a complete and correct statement of the funds and other property required by this subdivision to be reported, and that the statements therein are true to the best of his knowledge, information and belief.

(2) Like verified statements, in duplicate, shall be filed with the secretary of state, within 30 days after the first day of January in each year thereafter, by the cashiers or managing officers of all banking institutions and financial institutions which, on said first day of January, hold on deposit, or otherwise, any funds or other property, which by the terms of Section 3 of this Act are presumed to have been abandoned.

(3) The duplicate copies of these verified statements shall be delivered by the secretary of state to the attorney general immediately after filing.

Subdivision 2. The secretary of state shall have the statements referred to in Subdivision 1 of this section bound at the expiration of each filing period, and shall make and keep an alphabetical index of persons reported as depositors or owners, with appropriate references to the bound statements, and these bound statements and index shall be open to public inspection.

Subdivision 3. A copy of each statement required by Subdivision 1, together with a notice, directed to whom it may concern, stating that the deposits or other property

referred to in the statement have not been dealt with by additions thereto, withdrawals therefrom, or claim thereto, for a period of 20 years, and requesting all persons having knowledge or information relative to the whereabouts of the persons named in the statement, or other possible claimants to the funds or other property, to give this information to the subscribing officer, shall be displayed in a prominent place in the banking institution or financial institution for which the statement is filed, accessible to the public, for a period of 30 days from the date of filing.

Sec. 5. Subdivision 1. Whenever the attorney general has reason to believe, from an examination of the statements required by Subdivision 1 of Section 4 hereof to be filed, or from other information or investigation, that any funds or other property, in this Act referred to, have escheated to and become the property of the state by reason of the abandonment thereof, he shall commence an action or actions in the name of the state in this district court of Ramsey County to declare the escheat of and enforce the rights of the state in and to said funds or other property, or any part thereof. Such action shall be commenced by the filing of a verified complaint in the office of the clerk. All or any number of persons who are claimed to have abandoned such funds or other property and any other known claimants to the same may be joined as defendants in one action. The place of trial of any such action shall not be changed without the consent of the attorney general. Every such action shall be triable by the court without a jury.

Subdivision 2. (1) In any such action the state, at the time of the filing of the complaint in the office of the clerk, or at any time thereafter, may have the funds or other

property held by banking institutions and financial institutions on deposit, or otherwise, and claimed by the state to have been abandoned by the defendants, or any part of such funds or other property, attached, in the manner hereinafter prescribed, as security for the satisfaction of such judgment as it shall recover.

(2) To procure such attachment, the attorney general shall file a petition verified by himself or one of his assistants on information and belief, for a writ or writs of attachment, which petition shall set forth that the action is brought under the provisions of this Act for the purpose of declaring the escheat of and enforcing the rights of the state in and to certain funds and other property, claimed to have been abandoned, referring to the complaint on file for a description of the funds and other property involved; that the state, as plaintiff, desires certain of those funds and other property attached as security for the satisfaction of such judgment as it may recover, and that to that end he prays that one or more writs of attachment issue, directed to the sheriffs of such counties as shall be designated in the petition, requiring the attachment of the funds or other property to be in the petition described. The petition shall then set forth, as to each writ desired, the name of the county to the sheriff of which said writ shall run, and a statement of the funds and other property sought to be attached, stating as to each item of such funds and other property the name of the defendant by whom it is claimed it has been abandoned, and the names of any other known claimants thereto; the last known residence or business address of such person or person, if known, and if not known, stating that fact; the amount or value thereof, in-

cluding interest or other increase or proceeds thereof, whether funds or other property, and how held, describing the property if other than funds, and the name and business address of the banking institution or financial institution holding such funds or other property, including the name of the county in which it is doing business. A writ or writs of attachment shall then be allowed by a judge of the court in which the action is brought. No bond shall be required as a condition of allowing any such writ.

(3) Upon the filing of the petition and the order of allowance, the clerk shall issue the writ or writs prayed for. If more than one writ is issued, such writs may be directed to the sheriffs of different counties as specified in the petition. Each writ shall require the sheriff to attach the funds or other property held by banking institutions and financial institutions in his county on deposit, or otherwise, attachment of which was prayed for in the petition, and shall describe the funds and other property to be attached, stating as to each item thereof the same matters required to be stated in the petition.

(4) The sheriff, upon receiving the writ shall execute the same without delay. He shall attach all funds and other property described in the writ as being held by any banking institution or financial institution by leaving with such banking institution or financial institution a certified copy of the writ and a notice specifying the funds and other property attached. When he has executed the writ he shall annex to it an inventory of the funds and other property attached, and return the writ with his doings to the court.

Subdivision 3. Service of the summons may be made

upon the defendants in any action by publication of a copy thereof once each week for four consecutive weeks in a newspaper of general circulation published in each of the counties in which funds and other property have been attached. The first publication shall be made within 30 days after the issuance of the first writ of attachment in any action. If publications are made in more than one county such publications shall all be commenced within the same week. With the summons a notice shall be published, giving the title of the action and referring to the claim therein, and directed to all persons other than those named as defendants therein claiming any interest in any funds or other property described in the complaint, and requiring them to appear within 60 days after the first publication of the summons and show cause, if any they have, why it should not be adjudged that the owners of such funds and other property have abandoned the same, and why such funds and other property have not escheated to and become the property of the state, and notifying them that if they do not so appear and show cause the state will apply to the court for the relief demanded in the complaint. At the end of each such notice there shall be a statement of the date of the first publication of the summons and notice. A copy of the summons and notice shall be posted in a conspicuous place in each banking institution and in each financial institution holding funds or property described in the complaint, within 15 days after the first publication of the summons, and copies thereof mailed within the same period to all defendants whose last known place of residence or business is shown by the petition for writ of attachment to be in the State of Minnesota, at such last known place of residence or business.

Subdivision 4. Any person interested may intervene in such action, as provided by law.

Subdivision 5. Upon the completion of the publication of the summons and notice, and the elapse of sixty days from the date of the first publication thereof, and proof thereof, together with proof of the posting and mailing provided for in Subdivision 3 of this section, the court shall have full and complete jurisdiction over all the funds and other property which have been attached and of everyone having or claiming an interest in said funds or other property, and full and complete jurisdiction to hear and determine the issues in the action and render an appropriate judgment therein.

Subdivision 6. Upon the trial the verified statements filed with the secretary of state, pursuant to the provisions of Subdivisions 1 and 2 of Section 4 of this Act, shall be prima facie evidence of the facts therein stated. The court shall, if it finds that any party is entitled to any of the funds or other property described in the complaint, order that the action be dismissed as to such party, and the attachment of such funds vacated, without costs. If the court shall find as to all or any part of the funds and other property described in the complaint that the depositors or owners thereof have abandoned the same, it shall adjudge that such funds and other property have escheated to and become the property of the state, and that the state is entitled to recover the same.

Subdivision 7. Upon the entry of any judgment in favor of the state, the attorney general shall notify, in writing by mail, all banking institutions and all financial institutions holding any funds or other property adjudged to have

escheated to and become the property of the state, and demand that the same be forthwith transmitted to the state treasurer. If any such institution shall fail, within 30 days after the mailing of such written notice, to transmit such funds or other property to the state treasurer, the attorney general, after filing a proof of the mailing of the notice with an affidavit showing such failure to transmit the funds or other property, may proceed to have the judgment enforced by execution. Such a judgment as to any funds or other property shall be satisfied only out of the property attached. Executions may be directed to the sheriff of any county and shall run throughout the state without the necessity of filing any transcripts of the judgment in counties other than that in which it was rendered.

Sec. 6. All monies transmitted to the treasurer by banking institutions and financial institutions, and all monies collected on execution, shall be credited to the general revenue fund.

Sec. 7. Any person claiming to be legally entitled to any of the funds or other property involved in any action commenced under the provisions of Section 5 of this Act, who did not appear in said action, may, within a period of ten years after the entry of judgment therein, sue the state to recover the funds or other property of which it was alleged he was the owner or depositor, and in case such person be an infant or under disability, the period of limitation is extended to one year from the removal of such disability. In case such person recovers judgment the attorney general shall advise the legislature at its next session of such recovery and request an appropriation for the payment of such judgment. If funds or other property in-

involved amount to less than the value of \$200, any person making claim to such funds or other property may make application to the executive council for the refund thereof, and upon good cause shown, the executive council is authorized to order such refund paid to such claimant from the general revenue fund. A sufficient amount is appropriated annually to pay any such refunds so ordered by said executive council. In any suit brought under the provisions of this section no interest shall be allowed by the plaintiff and no interest shall be allowed by the executive council on any amount which it shall order paid.

Sec. 8. Any banking institution or financial institution which shall, or the cashier or managing officer of which shall, knowingly and wilfully violate any of the provisions of this Act shall forfeit to the State interest in the amount of 15 per cent per annum upon all such funds or other property held on deposit or otherwise by said institution as come within the provisions of this Act; provided, however, that, until it shall have been determined by final decision of a court of competent jurisdiction, from which no appeal or request for review has been made within the time permitted by applicable provisions of law or from which no appeal or request for review is permissible, that the provisions of this Act are valid and enforceable, no bank or financial institution shall become subject to the penalty herein provided for failure to comply with any provision of this Act if such failure be based upon its contention in good faith that the provisions of this Act are invalid as applied to it.

Sec. 9. Laws 1937,¹ Chapter 358, being Mason's Supplement 1940, Sections 7658-21 to 7658-27, is hereby repealed.

Approved April 24, 1943.

APPENDIX "B"**Wisconsin Bank Deposit Escheats Statute.**

220.25 ESCHEAT OF BANK DEPOSITS. (1) When any person shall die intestate, without heirs, leaving on deposit or otherwise any fund, funds or property of any kind with any banking institution, or shall abandon such fund, funds or property, the same shall escheat to and become the property of the state, to be disposed of in the same manner as other escheated property. The term "banking institution" shall include every banker, bank, branch bank or trust company within the state.

(2) Any person who shall have on deposit or otherwise with any banking institution any fund, funds or property of any kind, and shall not deal therewith for a period of twenty years by adding to or withdrawing therefrom, and shall not have asserted any claim to such fund, funds or property for such period, shall be presumed, unless shown to the contrary, to have died intestate, without heirs, or to have abandoned such fund, funds or property.

(3) (a) It shall be the duty of every banking institution which holds on deposit or otherwise any fund, funds or property of any kind, known by such banking institution to have escheated to the state, to inform the attorney general of such fact within thirty days after it becomes known to such banking institution.

(b) The cashier or managing officer of every banking institution shall, within thirty days after the first of January, annually return to the secretary of state a sworn statement in duplicate showing the names of persons who have left on deposit or otherwise any fund, funds or prop-

erty of the value of ten dollars, or more, and have not dealt with respect thereto for a period of twenty years by adding to or withdrawing therefrom, or asserting any claim to such fund, funds or property for such period, unless known to such officer to be living. Such statement shall show the amount of such deposit, including interest, or the value and nature of such property; and the depositor's or owner's last known place of residence or business. Such subscribing officer shall certify that said report is a complete and correct statement of all such unclaimed funds and property to the best of his knowledge, after diligent inquiry. The duplicate copy of such report shall be delivered by the secretary of state to the attorney general immediately upon its receipt.

(c) . The cashier or managing officer of every banking institution shall, within thirty days after the first day of January, every five years commencing January 1, 1936, return to the secretary of state, a sworn statement showing the names of persons who have left on deposit or otherwise any fund, funds or property of the value of ten dollars, or more, and have not dealt with respect thereto for a period of ten years by adding to or withdrawing therefrom, or asserting any claim to such fund, funds or property for such period. Such statement shall show the amount of such deposit, including interest, or the value and nature of such property and the depositor's or owner's last known place of residence or business; such subscribing officer shall certify that said report is a complete and correct statement of all such unclaimed funds and property to the best of his knowledge, after diligent inquiry.

(d) . The secretary of state shall have the aforemen-

tioned reports permanently bound with an alphabetical index of the depositors, or owners, with an appropriate reference to the bound reports, and such bound reports and index shall be open to public inspection.

(e) A copy of the reports required by paragraphs (c) and (d), together with a notice directed to whom it may concern, stating that such deposits or property have been unclaimed for a period of ten or twenty years, as the case may be, and requesting all persons having knowledge or information relative to the whereabouts of such depositors or other possible claimants to give such information to the subscribing officer, shall be displayed in a prominent place in such bank for a period of thirty days from the date of the filing of such report, and in cases provided by paragraph (c), a copy of such report and notice shall be published once each week for four consecutive weeks in a newspaper of general circulation in the county where such bank is located, and the expense of publication shall be deducted proportionately from such deposits.

(4) If, upon investigation, the attorney general shall conclude or have reason to believe that any fund, funds or other property have escheated to the state, he shall institute proper proceedings under the provisions of this section to have such funds or property adjudged the property of the state and transmitted to the state treasurer. Such suit shall be commenced by the attorney general in the name of the state in the circuit court of Dane county, and the bank or banks in which the funds or property are deposited, and the names of the depositors or owners, as reported, shall be joined as parties.

(5) (a) Service of process in such action or actions

shall be made by the delivery of a copy of the summons and complaint to an officer of each of the defendant banks and by publication of a copy of such summons once each week for four consecutive weeks in a newspaper of general circulation published in the county in which the depository is located. With the summons, a notice shall also be published, giving the title of such action and referring to the complaint therein, and directed to all persons other than those named as defendants therein, claiming any interest in any deposit or property mentioned in said complaint, and requiring them to appear within sixty days after the first publication of such summons and show cause, if any they have, why it shall not be adjudged that the owners of such deposits or property have died intestate without heirs, or have abandoned such deposits or property, and why such funds or property have not escheated and should not be deposited with the state treasurer as herein provided, and notifying them that if they do not so appear and show cause, the state will apply to the court for the relief demanded in the complaint. At the end of such notice there shall be a statement of the date of the first publication of said summons and notice.

(b) Any person interested may appear in such action and become a party thereto. Upon the service of the summons and complaint upon the defendant bank or banks, and upon the completion of the publication of the summons and notice and the elapse of sixty days from the date of the first publication of said summons and notice, the court shall have full and complete jurisdiction over such deposits and property and of the person of every one having or claiming any interest in said deposits or property,

and shall have full and complete jurisdiction to hear and determine the issues therein and render the appropriate judgment thereon.

(c) If, upon the trial of such action, it shall adjudge that the lawful owner of such funds or property has died intestate without heirs, or has abandoned such funds or property, it shall be adjudged that such funds or property has escheated to the state, and the banking institution in which such funds or property are on deposit shall forthwith deliver same to the state treasurer to be received by such treasurer and be dealt with in the same manner as other escheated property.

(d) Any person not appearing in such action can sue the state to recover such funds or property, with interest thereon at such rate as would have been received had said property been permitted to remain in the original depository, for a period of five years after the entry of such judgment, and in case such person be an infant or under disability, the period of limitation is extended to one year after the removal of such disability.

(e) Any banking institution which shall violate any of the provisions of this section shall forfeit to the state the sum of one hundred dollars for every day that such violation continues.

FILE COPY

Supreme Court of The United States

OCTOBER TERM, 1943

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JAN 3 1944
CHARLES ELMORE CROPLEY
CLERK

No. 154

ANDERSON NATIONAL BANK,

Suing on Behalf of Itself and All Other Similarly
Situating,

Appellant,

vs.

**H. CLYDE REEVES, Individually and as Commissioner
of Revenue of the State of Kentucky and a Member of
the Kentucky Tax Commission,**

G. M. C. PORTER, and

**R. L. McFARLAND, Individually and as Members of the
Kentucky Tax Commission,**

**HUBERT MEREDITH, Individually and as Attorney
General of the State of Kentucky,**

Respondents

Appeal from the Court of Appeals of the State of Kentucky

**BRIEF OF THE STATE OF MICHIGAN AS
AMICUS CURIAE**

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Attorney General.

EDMUND E. SHEPHERD,
Solicitor General.

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Assistant Attorney General.

G. DOUGLAS CLAPPERTON,
Assistant Attorney General.

**Attorneys for the State of Michigan
as Amicus Curiae.**

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General of the State of Kentucky,
Respondents

Appeal from the Court of Appeals of the State of Kentucky

**BRIEF OF THE STATE OF MICHIGAN AS
AMICUS CURIAE**

Herbert J. Rushton, Attorney General of the State of
Michigan, as amicus curiae, presents this brief in behalf

of the State of Michigan and respectfully requests that it be accepted by this court and filed in this action. The reasons therefor are:

(a) The State of Michigan has a special interest in the questions and principles involved in this action, decision upon which might materially affect the rights and interests of the State of Michigan.

(b) Litigation is now pending, in which the State of Michigan is a party, involving questions and principles of law similar to those involved in the instant case.

(c) Administration of the laws of the State of Michigan relating to unclaimed or abandoned property has been suspended in its application to national banks by express direction of the Comptroller of the Currency of the United States, as indicated by letter of January 15, 1942, addressed to the Michigan State Board of Escheats. The relevant portion of that letter is as follows:

"In the event of a suit or suits against Receivers of insolvent National banks located in the State of Michigan to require compliance with this State statute, all defenses available to both *operating* National banks and closed National banks will be interposed. The authorities relied on by our Receivers, in addition to *Starr v. Schram*, *supra*, and the decisions cited therein, will include *Cook County National Bank v. United States* (1882), 107 U. S. 445; *Davis v. Elmira Savings Bank* (1896), 161 U. S. 275; *Guthrie v. Harkness* (1905), 199 U. S. 148; *Easton v. Iowa* (1903), 188 U. S. 220; *Deitrick v. Greaney* (1940), 309 U. S. 190, and *American Surety Company v. Bethlehem National Bank* (1941), 86 L. Ed. (adv. sheets), page 231." (emphasis ours)

PRELIMINARY STATEMENT

We concur with the results reached in the brief of the Attorney General of Minnesota as *amicus curiae*, filed in this action, in which the Attorney General of Wisconsin has joined. We shall endeavor to avoid as far as possible retreading the grounds covered by that brief, as well as the brief of counsel for the Commonwealth of Kentucky.

We believe it is fair to say that this controversy stems from a position taken by the Comptroller of the Currency upon the subject in question. That there is a state of hopeless confusion on the general subject here involved, due largely to the application of general principles enunciated by this court, and conflicting decisions of state courts and lower Federal courts, cannot be successfully disputed.

Therefore, we shall not in this brief add to the already existing confusion by an exhaustive comparison of authorities in an effort to differentiate one from the other. Instead we shall attempt to go straight to the root of the controversy and attempt to substantiate our conclusion that the confusion, conflicts and controversies were wholly unnecessary in the first place and should never have arisen.

The argument and conclusions reached in this brief are intended to state only the position of the State of Michigan relative to the questions involved. They do not necessarily run counter to the position taken by the Attorney General of Kentucky, or of Minnesota or Wisconsin. Indeed, we believe our conclusions reach the same result.

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ARGUMENT

1. THE THEORY OF ESCHEATS LAWS

The present attack upon the Kentucky law of escheats (so-called) is predicated upon two main contentions stated on page 3 of appellant's brief. They are:

"1. Does not the Escheat Act in escheating or taking deposits from national banks on account of inactivity violate the National Banking Act?

"2. Does not the Escheat Act in escheating or taking presumed abandoned deposits from national and state banks and presumed abandoned property from others without suit, effective notice to the owner, hearing or judicial decree violate the due process clause of the Fourteenth Amendment?"

With all due respect for counsel, we believe that appellant's contentions are predicated upon at least two faulty premises:

•First. We think they have an erroneous conception of escheat laws in general, their intent and purposes, and the basis of their validity as a part of the body of the law of a state relating to property and property rights.

Second. We believe that appellant has taken a wrong premise in assuming that the question here presented involves the escheat of a bank deposit, as such.

We will discuss these propositions in their order.

Appellants variously refer to the Kentucky law as—

"essentially a revenue measure; the purpose of which is to get money for the state."

(Appellant's Brief, p. 32)

That,—

“the whole theory of the act shows that the state is not taking over the deposits for the benefit of depositors. The pretext for the taking is that the owners have abandoned their deposits. If such is the case, they would naturally not seek to recover them back. This clearly shows that the act was not passed for the protection of the depositors.”

(Appellant's Brief, pp. 32-33)

Language of similar import is used throughout the brief. They seem to look upon the law as a forfeiture or confiscation measure for the benefit and advantage of the Commonwealth of Kentucky, and apparently overlook the theory and basic doctrine upon which escheat laws in general are founded.

Every law of escheats is an integral and indispensable part of the body of laws of a state providing for and governing the descent and distribution of property having legal situs within the state or within its jurisdiction. This is true whether the law is incorporated in the general laws of descent and distribution of property, or contained in a separate code or system of laws by itself.

General laws of descent and distribution of property provide for descent,—

1. When the owner dies, leaving heirs—thus recognizing and creating the right of inheritance of property.
2. When the owner dies, leaving a will—thus vesting in the owner a right to make a testamentary disposition of his property.

It is obvious that these general laws, standing alone, would not be complete and cover all incidents of property and property rights. There remain two distinct classes of property undisposed of, namely:

(a) Property of a person who dies intestate, leaving no legal heirs;

(b) Property of a person who is missing or who has disappeared, or who has abandoned, or failed to claim, his property under circumstances which give rise to a legal presumption of death or abandonment declared by statute.

Statutes covering these classes of property are referred to as "statutes of escheat," even though in some cases the term might be a misnomer.

Of course, the doctrine of reversion, which was the basis of the English laws of escheat, never obtained in this country, although some of the colonial Assemblies, notably Massachusetts, New Hampshire and Connecticut, at an early day enacted escheat laws of their own in which the escheat accrued to the school fund, but not as a reverter.

Perhaps we have space to observe that the word "escheat" is of French-Norman derivation, with a Latin root, meaning "chance" or "accident." As we know, the doctrine was introduced in England in 1066 by William the Conqueror following the Norman conquest. It was employed by the Crown to replenish the depleted Crown exchequer and to enable William to make a living for himself. His exhaustive survey of all of the property of the realm finally culminated in the celebrated Domesday Book. The basis or theory of the English escheat laws was the one announced by William who proclaimed that the title to all property in

the kingdom both real and personal, vested in the Crown by virtue of conquest, and that upon failure of the title for any cause, including all sorts of fines, penalties and forfeitures, reverted to its source,—the Crown.

The doctrine, or theory of the law, upon which the validity of American laws of escheat, as announced by this Court is based is that public policy and the general interest of society require that property should not remain abandoned without someone representing it and without an owner legally capable of alienating it.

Cunnius v. Reading School District, 198 U. S. 458.

We cannot conceive of any other valid basis, under Constitutional government, which would justify the state in assuming jurisdiction over the disposition of private property. Attached to this doctrine, or theory of law, is the rule against forfeitures always disfavored by the courts. Hence, the legal requirement that the rights of the missing owner must be safeguarded and that he must be protected by due process.

Therefore, when the legislature of the Commonwealth of Kentucky enacted the escheats law in question, it was but discharging the duty which it owed to society, and followed a rule of public policy which requires the state to enact laws providing for the descent and distribution of abandoned property.

Clearly, public policy and the general interests of society contemplate that property shall, as far as possible, be kept moving along the channels of trade and commerce and that title shall pass by transfer according to the needs of business.

It embodied in the law provisions to safeguard the depositor calculated to avoid the working of a forfeiture. Appellants assert that the legislature failed in the accomplishment of that purpose. It does not sound reasonable, however, to assail such a law with the charge that it was enacted for ulterior purposes and to swell the exchequer of the state.

In the *Cunnius* case it is further said:

“It is indeed natural to presume that a person who has disappeared, if he continues to exist, is prevented from returning by some obstacle stronger than his own will, and it therefore places him in the category of an incapable person, whose interest it is the duty of the law to protect.”

On this score, the inquiry presented is as to just what the legislature may do, what kind of a law it may enact, to serve public policy, and the interests of society, as well as protect the incapable person. The appellant insists that the legislature may not, by law, provide for the appointment of a legal representative of the incapable person to act in his behalf to preserve and conserve his property. It says that the legislature would have power only to prescribe judicial procedure which must first be taken to escheat the title of the property; that any other method of protecting the incapable person would be violative of due process. We submit that such a contention runs counter to the whole purpose and intent of such laws, so frequently announced by this court.

The import of appellant's contention is that the legislature may not by law provide a method whereby the escheat of the title to the property shall be deferred as long as

possible, consistent with the principle that the property should not remain too long without definite ownership. Carried further, the contention would mean that the indefinite period of time, expressly provided by the Kentucky statute, during which the incapable person could reclaim his property, must be cut off by a drastic provision requiring immediate escheat of the title. That does not sound reasonable.

The escheat law of the Commonwealth of Kentucky, as well as the escheat law of the State of Michigan, or of any other state with like protective provisions, safeguarding the property rights of the individual, may be said to be a type of social legislation wherein all of the people, through their legislature, seek to protect the owner of property, and his possible unknown heirs, from loss due to chance or accident, or any untoward event beyond his control. The power of the legislature to enact such legislation is undoubted.

The clear intendment of that law is that the state shall be a conservator or trustee of the missing or incapable person. The failure of the legislature to use the express term "trustee" or "conservator" is unimportant, if that relationship is in fact set up.

The protective features of the Kentucky law have been fully discussed and explained in the brief of counsel for appellee. We are bound to say that the solicitude of the bank for the welfare of the missing or incapable person comes with a rather bad odor. Looking at it in a realistic way, we know of nothing in bank practices or customs which indicates that banks exhaust every source of information to discover the whereabouts of a customer who has

failed to claim his deposit, even over a long period of years. To say that the interest of the bank in the welfare of an incapable person is superior and paramount to that of the people of the Commonwealth of Kentucky does not have an appealing tone. Of course, the argument is that the bank is extremely desirous of protecting its customer and in performing its contract of deposit with him.

Keeping these principles in mind, and particularly noting the theory that these laws have their foundation upon a rule of public policy, calculated to serve the interests of society, it would seem that those laws should be construed by the courts in the most favorable light and should not be viewed with the same disfavor which attaches to other laws of a wholly different character. It would seem that every intendment should be indulged by the courts to uphold the validity of the legislation, if at all possible to do so.

Appellant's second premise.

Appellant's contention is predicated upon the assumption that the Commonwealth of Kentucky is seeking to escheat the money on deposit in the appellant bank in an action against the bank, pursuant to the Kentucky statute. To enjoin this, and any action of the State looking to the surrender of the inactive bank deposits, and other property, this suit was instituted.

The faulty premise is that bank deposits, as such, are escheatable.

In our opinion, the money itself; or other property on general deposit in a bank, national or state, is not escheatable. Certainly, it is not escheatable while the bank is in existence and solvent.

Earlier in this brief we pointed out that this court had repeatedly declared the basis of all laws of escheat in this country to be that public policy and the interests of society require that property shall not remain without *ownership*, and without *title* in someone capable of alienating it.

Therefore, *ownership* of property is the determining feature, a necessary element of an escheat. The purpose of such laws is to keep *ownership* alive and active.

The ownership of the actual money on deposit in a bank, other than money deposited under special contract, is in the bank.

This doctrine has been announced by this court at least as early as *Marine Bank v. Fulton Bank*, 69 U. S. (2 Wall.) 252, and has been consistently reaffirmed in,—

Scammon v. Kimball, 92 U. S. 362;

Phoenix Bank v. Risley, 111 U. S. 374 (with cases cited).

Commercial Bank of Pa. v. Armstrong, 148 U. S. 50.

Jennings v. U. S. F. & G. Co., 294 U. S. 216 (d.p. 220)

Dakin v. Bayly, 290 U. S. 143 (d.p. 154) and cases cited in dissenting opinion.

In *Marine Bank v. Fulton Bank*, the general doctrine is stated thus:

“All deposits made with bankers may be divided into two classes, namely: those in which the bank is bailee of the depositor, the title to the thing deposited remaining with the latter; and that other kind of deposit of

money peculiar to the banking business, in which the depositor, for his own convenience, parts with the title to his money and loans it to the bank; and the latter, in consideration of the loan of the money and the right to use it for his own benefit, agrees to refund the same amount, or any part thereof, on demand. It would be a waste of time to prove that this latter was a debtor and creditor relation."

The same doctrine is variously stated in other cases as being one in which the depositor or customer loans the money to the bank and transfers title thereto to the bank, *with the superadded liability or obligation of the bank to repay the loan upon demand*. The same doctrine is the law, or rule of decision, in most, if not all, states, and particularly the Commonwealth of Kentucky and the State of Michigan. It is also the law of the State of California.

Armstrong, Receiver, v. National Bank of Boyertown, 90 Ky. 431, 6.

Perley v. County of Muskegon, 32 Mich. 132 (20 Am. Rep. 637).

Plumas Co. Bank v. Bank of Rideout, et al., 165 California 125.

The conclusion seems irresistible that so far as the bank deposit is concerned, there is no failure of ownership, nor is there any failure of title, because both are in the bank. The money has been, pursuant to recognized customs and usages, commingled with the other moneys of the bank. As stated in the Jennings case, it is fungible property. It is not subject to replevin or any other possessory action on the part of anybody. The only qualification upon the bank's ownership and title is its obligation or liability to repay the loan on demand.

Of course, money on special deposit, such as trust or fiduciary deposits, is in a different category, but even in such case, the money or property is not escheatable as against the bank.

The real subject of the escheat—the res, in case of money on deposit,—is the intangible property of the customer or depositor which entitles him to repayment of his loan upon presentment and demand. This may be evidenced by a bank passbook, certificate of deposit, cashier's check, or whatever receipt the customer or depositor received from the bank when he made the deposit. These evidences of indebtedness, whatever their character, represent choses-in-action which constitute property which, under the theory of the law, the owner has abandoned and which has become ownerless by reason of such abandonment.

These choses-in-action—and we use the term in its broadest sense—constitute the property to which the Kentucky law is directed, and over which it seeks to exercise jurisdiction. It is the only property which may be escheated under the Kentucky law in case escheat finally becomes necessary or expedient.

When a legal representative of the owner of such property has been duly appointed as provided by the law of the state, these choses-in-action may be presented by him to the bank for payment and that is all the bank has to do about it. Its obligation and its liability to repay the loan has become absolute, and refusal to honor the demand would constitute a breach of its contract. There would be no occasion for the public representative to resort to escheat proceedings in order to secure repayment of the loan. Indeed, as

we have above stated, such escheat proceedings could not be maintained by him as against the bank itself.

In such case, the public representative is only marshaling the assets of the estate of the absentee in the same way as would an ordinary legal representative of a decedent estate. The bank, merely because it is a bank, would occupy no different relationship than an ordinary debtor or depository.

These evidences of indebtedness forming a part of the assets of the estate of the absentee might be promissory notes, or other negotiable paper, contracts, stocks, bonds, or other security which the absentee has abandoned. Certainly it would be an absurdity to say that the legal representative of the absentee must institute escheat proceedings against the obligors in such papers and documents instead of collecting the debt by ordinary processes.

We have not overlooked language employed in opinions in several cases which refer to a bank depositor as "the owner of the deposit." One of these cases is,—

Security Savings Bank v. California, 263 U. S. 282.

However, we construe this language more as language of convenience rather than of strict application. We think the effect of the language used is explained away by other language of the opinion. Certainly it would not be intended to overrule, in any sense, the doctrine in *Marine Bank v. Fulton Bank*, supra. To overrule that doctrine would have serious consequences and upset the banking laws of this country, as well as the Bank Collection Code.

Further, decisive opinions of that character are not overruled in any such indirect way.

Perhaps it would not be too trite to explain by illustration what we mean. Assume that the public representative of the estate of the absentee should discover an unpaid promissory note. If the note were due, it would be his duty to present it to the maker for payment. If it were not due, it would be his duty to hold it until it became due. If payment were refused, it would be his duty to enforce collection by suit. It would be absurd to say that he must, under any escheats law, escheat the money or other property the maker received when he gave the note. In other words, the escheat would operate against the note itself, or the avails of its collection, and not against the money or property of the maker.

The same illustration would apply to stocks, bonds, or other securities which the public representative might discover among the assets of the absentee estate. Certainly the public representative would not be foolish enough to institute escheat proceedings against the obligors of the securities or other property. He could not maintain the proceedings if he did for the very obvious reason that the obligor has no escheatable property in possession. The obligor could be required only to meet and discharge his obligation. If he refused to pay, payment could be compelled by ordinary legal processes. He could not be subjected to escheat proceedings.

It would seem therefore that any concern or anxiety on the part of the appellant bank that it is likely to be subjected to escheat proceedings under the laws of the Commonwealth of Kentucky, are wholly unfounded. One may search

in vain to find in the Kentucky statute any provision providing for a direct escheat of money on deposit in a bank, as against the bank. Indeed, it is extremely doubtful that the law authorizes or forms any basis for such an escheat. It refers wholly to "abandoned property." In our opinion, the 1942 amendment of the Kentucky law (Appellant's brief p. 70) clearly discloses the intent of the legislature in that respect. The Kentucky law, like most statutes of escheat relating to abandoned property, requires a report of unclaimed property. The office of such a report is manifest. The law anticipates that a large bulk of property located in the state may be abandoned without the state having knowledge of it and without adequate means of discovering it. Therefore, the requirement of a report by depositories.

The legislature would have no constitutional power to give its Commissioner of Revenue, or any other like officer or agency of the state, visitorial powers over banks, trust companies or other depositories of property. It can only require reasonable reports. From these reports, there may be obtained secondary evidence of title to abandoned property of the absentee estate which would enable the legal representative to recover, even in the absence of finding the original evidences, such as,—in the case of a bank, a passbook, certificate of deposit, or other receipt. Thus the records of the bank constitute only evidentiary proof of the existence of the abandoned property and its nature.

The money or property on deposit with a bank is not the thing which gives value to the abandoned property. Instead, the liability of the bank to repay the loan is what gives value and vitality to it.

On page 25 of its brief, appellant says:

“Of course a state can escheat a deposit in a national bank where there has been a judicial determination of death intestate without heirs or any other judicial determination showing that there is no present owner of the property. National banks every day recognize court orders regarding executors, administrators, committees, receivers, etc.”

What we have said above sufficiently indicates that we cannot subscribe to this proposition.

In its other aspect, this statement narrows the inquiry to one which would draw a distinction between a legal representative of the absentee estate, appointed in judicial proceedings, and a legal representative designated in the law itself, with specially designated and limited powers and duties.

So far as the existence of a distinction between a case of an owner of property dying intestate without heirs, and an owner who disappears or for any reason has failed to claim his property or exercise ownership over it, there is none. Both, under the theory of the law, and in fact, have abandoned their property. The former has abandoned it by failure, in the absence of heirs, to make a testamentary disposition of it and continue its alienability. The latter has abandoned for reasons unknown, but as said in the *Cunnius* case, presumably against his will which raises a presumption of abandonment declared by statute.

It is elementary that reasonable statutes of presumption are valid and will be upheld by the courts. Particularly will they be upheld when such statutes relate to the descent and

distribution of property because they are necessary and indispensable to protect the interests of society.

On page 26 of appellant's brief, counsel say:

"Our point is that a state cannot regulate a national bank by prescribing how long national banks can retain deposits whether active or inactive. In *First National Bank of San Jose v. California*, 262 U. S. 366, this court pointed out the danger of permitting state interference with deposits in national banks."

We are impelled to say that here again appellant follows a false premise by assuming that the Kentucky law seeks to escheat money itself or other property on deposit in appellant bank.

II. THE SAN JOSE CASE

We feel that the decision in the San Jose case could very well have followed the doctrine laid down in *Marine Bank v. Fulton Bank*, supra, as well as that announced in the *Cunnius* case, and thus disposed of the issues involved in that case. However, we find from an examination of the briefs of counsel filed in the case that the rule of decision in those cases was not presented to the court.

The fact is inescapable that this case has received a construction and interpretation which has resulted in the multitude of controversies, conflicts of decision and confusion which we have heretofore referred to in this brief. From it stems not only the contentions made in the instant case, but rules and opinions of the Comptroller of the Currency, as well as antagonistic attitudes assumed by national banks throughout the country.

In that case the Attorney General of California brought suit against the First National Bank of San Jose under Section 1273 of the California code which provided that all deposits of money in banks, which have remained unclaimed for more than 20 years and where the depositor or claimant has filed no notice of present residence within that time, shall escheat to the State. The Attorney General is required to start suit against the bank and such depositors to recover the amount of the deposits, and if in the suit it is determined that the moneys are unclaimed, then the court must render a judgement escheating them to the state. The facts were that the deposit of a certain depositor had been unclaimed for more than 20 years, no notice of address having been given to the bank nor any other activity having occurred in connection with the deposit, and the depositor was not known by the President or managing officers of the bank to be living. The California Supreme Court affirmed a judgment escheating the deposit, but this court reversed the California court on the ground that the California statute qualified in an unusual way the contract between the bank and the depositor, because different states might have similar laws of varying length of time of dormancy of deposits, and prospective depositors might hesitate to make deposits in national banks and thus submit their funds to possible confiscation.

The decision came down in 1923. Since that time the status of national banks as instrumentalities of the Federal government has been drastically changed. Federal Reserve Banks have to a marked degree supplanted national banks in respect to their use as governmental agencies. National banks no longer may issue circulating notes, and doubtless their power to do so cannot be revived without further Congressional legislation. It can be safely said that the or-

dinary national bank of today is not far different respecting its obligations to the government than state banks. Of course, these facts would not be wholly determinative of the questions here involved, but they have their application.

While we are strongly inclined to wholly concur with other counsel who have filed briefs in this case, in the conviction that the case should be overruled, we realize the possibility, remote as it may be, that it may be clarified so as to put an end to all doubt as to its meaning.

We are aware that the decision in the case had a per curiam approval in,—

National City Bank v. Philippine Islands, 302 U. S. 651, as well as in,—

Starr v. O'Connor (Schram), 118 Fed. (2d) 548.
Certiorari denied, 314 U. S. 695.

The original records and files in the Philippine case disclose an escheat statute of the Islands (p. 15 of Appellant's Petition for writ of certiorari), which provides for an out and out forfeiture to the territory of all bank deposits that have been dormant for more than 10 years, and dormancy alone is sufficient to escheat them directly to the territory. No presumption of abandonment is involved, since under a different statute of the territory, presumption of abandonment obtains only after a lapse of 15 years. The Philippine escheats statute makes no provision for recovery by anybody from the territory after the deposits have been escheated.

The authority of the case of *Starr v. Schram* is clouded by reason of an unusual development which occurred during the progress of the case.*

An analysis of the statute in the San Jose case, as quoted by the court at the beginning of the opinion, discloses that it declared an outright escheat to the state of a dormant or inactive bank deposit. The court said:

"It further directs the Attorney General to institute actions in the Superior Court for Sacramento County *against banks* and depositors to recover all such amounts, 'and if it be determined that the moneys deposited in any defendant bank or banks are unclaimed as hereinabove stated, then the court must render judgment in favor of the state declaring that said moneys have escheated to the state and command said bank or banks to forthwith deposit all such moneys with the State Treasurer. * * *'" (emphasis ours)

To all intents and purposes, the power of the court to exercise its discretion and judgment upon the issues was denied by statute. The statute compelled a judgment of escheat because of mere inactivity, or so-called dormancy, notwithstanding the possibility that the absentee was still

*This was a declaratory judgment action. After the decision in the United States Circuit Court of Appeals of the 6th Circuit came down, the Michigan legislature drastically amended the Michigan law involved in that case. The petition for certiorari filed in this court by the Attorney General of Michigan was forcibly assailed and objected to on the ground that the statutes involved had been drastically amended so that the case had become moot. That any declaration of the Circuit Court as to the validity of the old law would be valueless and futile. These objections were sound and tenable and could not be very well opposed. Of course, whether or not those objections influenced or controlled the denial of the writ, is not reported.

alive, or that he had known legal heirs or that such claimed absentee might be able to supply proofs that he had no intention to abandon the property or that he had not really done so.

A similar interpretation of the San Jose case was made by the 6th Circuit Court of Appeals in *Territory of Alaska v. First National Bank*, 322 Fed. (2d) 277. The court found the escheats statute of Alaska applicable to National banks and distinguished the San Jose case, saying that in that case the California law was invalid as to National banks as "qualifying in an unusual way agreements between National banks and their customers," and that "the California statute purports to 'escheat' and forfeit to the state any deposit though the depositor may be alive or may have died leaving heirs, where for the period of 20 years the account has been wholly inactive respecting both deposits and withdrawals and neither the depositors nor any claimant has filed any notice with such bank showing his or her present residence."

We have attached considerable significance to the following statement in the opinion in the San Jose case:

"and we think, *under circumstances like those here revealed*, a state may not dissolve contracts of deposit, even after 20 years, and require national banks to pay to it the amounts then due; the settled principles stated above oppose such power." (emphasis ours)

In any event, the words "under circumstances like those here revealed" indicate that under other circumstances the decision might have been different.

In the respect indicated, as well as others, the law of California differs radically from the law of Kentucky. The latter law is not open to such an objection because it requires the Commissioner of Revenue, whenever it becomes necessary in the interests of society, to institute direct proceedings for the escheat of the title, and abandonment with all its incidents must be established. This matter has been fully discussed in the brief of counsel for the appellee.

It is clear that this court in the *San Jose* case looked upon the proceedings as an attempt to dissolve the contract of deposit by a direct escheat under circumstances which would work a forfeiture. The Kentucky law proceeds on no such basis. Instead, it does not seek to "dissolve the contract of deposit," but rather, seeks to keep that contract in existence and in full force and effect, and in due proceedings and processes make demand upon the bank to fulfill the contract by paying the amount of the deposit to a legally constituted authority of the state representing the depositor. We submit that that is a far different situation.

It is inconceivable that the opinion in the *San Jose* case intended to hold that a national bank, or any other bank for that matter, could indefinitely refuse to repay a loan made to it by a customer and continue the credit on its books no matter what the circumstances and regardless of the provisions of any state law.

Such a rule would run directly counter to the rule in.—

Provident Inst. for Savings v. Malone, 221 U. S. 660, and the opinion of this court in.—

Security Savings Bank v. California, supra, decided less than six months subsequent to the San Jose case, in which the court said:

“The contract of deposit does not give the banks a tontine right to retain the money in the event that it is not called for by the depositor. It gives the bank merely the right to use the depositor’s money until called for by him or some other person duly authorized. If the deposit is turned over to the State in obedience to a valid law, the obligation of the bank to the depositor is discharged. *Louisville & Nashville R. R. Co. v. Deer*, 200 U. S. 176. It is no concern of the bank’s whether the State receives the money merely as depositary or takes it as an escheat.”

It is also inconceivable that Congress, in enacting the National Bank Act, intended any such result. To have done so, Congress would have violated the 10th Amendment of the Federal Constitution.

III. THE FEDERAL POWER

The power to provide for and govern the descent and distribution of property having locality in the state, or coming under its jurisdiction, is a reserved power of the State and of the people, under the 10th Amendment, and not a granted power of the United States under the Constitution.

Christianson v. King County, 239 U. S. 356, (d.p. 366)

Congress has at no time by any direct action, attempted to exercise the power thus reserved to the states in relation to such property and obviously could not do so.

The National Bank Act cannot be construed as such an attempt. That would amount to accomplishing by judicial construction that which could not be done by an act of Congress. Of course, this does not mean that a state law which violates the Constitution of the United States or the Constitution of the state itself, or which conflicts with a *valid* act of Congress, could be upheld.

Our construction is further influenced by the court's reference to the statute as imposing limitations and restrictions as various and numerous as the states, and as obviously an attempt to qualify in an unusual way agreements between national banks and their customers. Also the following:

"The depositors of a national bank often live in different states and countries; and certainly it would not be an immaterial thing if the deposits of all were *subject to seizure* by the state where the bank happened to be located." (emphasis ours).

San Jose Case, Supra.

We are not impressed with the view that the failure of the Supreme Court of California to express an opinion upon the question whether the judgment of the Superior Court operated as a present escheat of the rights of the several depositors against the respective banks, or whether the depositors have a right to reclaim their deposits, is significant.

We think if that really influenced the opinion, the court would have stated a conclusion following the bare statement, or, following the well known rule of this court, would have decided the question itself in the absence of a decision by the lower court.

We feel bound to comment upon the last paragraph of the opinion emphasizing the necessity often pointed out by this court for protecting Federal agencies against interference by state legislation and declaring that the approved principle of *obsta principiis* should be adhered to.

On this proposition the opinion cites many cases, from *M'Culloch v. Maryland*, 4th Wheaton 316, down.

It is puzzling to note that all of these cases, except the case of *Davis v. Elmira Savings Bank* (which was a preference case) are tax cases, involving the question of the right of the states to tax the property or franchise of Federal agencies.

The right of Congress to determine whether and to what extent its instrumentalities may be taxed, is granted by the Constitution.

Maricopa County v. Valley Bank, 318 U. S. 357 (and cases cited on p. 361)

In that case the court said that the authority of the state to impose such taxes does not stem from the reserved power of the state under the 10th Amendment, but is a delegated power of Congress which may permit or prohibit such taxation.

The power of a state to govern the descent and distribution of property—which necessarily includes the escheat of unowned or abandoned property—stems directly from the 10th Amendment as a reserved power of the states. We submit that the analogy of the tax cases cited in the *San Jose* case is not convincing.

Carried to the ultimate, the language would give precedent in all cases of conflict between state and Federal agencies of government. Standing along in such bare fashion we think the statement is dangerous.

Considerable stress is given to a footnote in the reported opinion in *Security Savings Bank v. California*, supra (Appellant's Brief, p. 23).

There is no way of learning the authorship of that footnote. We do not know whether it is a part of the text of the opinion or whether it is the work of a reporter of the published volume. We are inclined to believe it is the latter because a search of the opinions of this court, and particularly of Justice Brandeis who wrote the opinion in the *Security* case, discloses the exercise by the court of meticulous care in making text reference to marginal notes. If this marginal note is a mere annotation, then it amounts to very little.

Appellants attach considerable importance to the statement made in the opinion in the *San Jose* case, that if California may thus interfere, other states may do likewise and instead of 20 years, varying limitations may be prescribed,—3 years perhaps, or 5, or 10; or 15.

If this statement is detached from the qualifying statement we have referred to, namely, "under circumstances like those here revealed, it might have a meaning which counsel for the appellant apparently give it. In that event, the statement, carried to its ultimate end, would amount to a holding that all escheat laws are invalid because they contradict the intent of Congress. The statement would also mean that a public representative of an absentee depositor

of a National bank who has abandoned his property could not make a demand upon a National bank for performance of its contract originally made with the depositor.

We believe that not only did Congress not intend any such result as that, but that this court in that opinion did not intend any such outcome.

On page 39 of its brief, appellant complains that the operation of the Kentucky law would deprive it of the use of property without compensation, and cites the case of

Chicago R. I. & P. Ry. Co. v. U. S., 284 U. S. 80

That is a railroad rate case. We do not find it in point.

Apparently the appellant claims that the use of property is a property right and it asserts that it has a right to use it. That is true. It has had the use of the money loaned to it for 10 years or more, possibly without interest, and without any return to its customer or depositor. To turn the illustration in the San Jose case around, this claim of the appellant would mean that the National Bank Act, fortified by the San Jose opinion, would permit the bank to hold onto the money it received from the loan, and refuse to pay it 10 years, 20 years, 50 years, or 100 years; or indefinitely.

We submit that Congress intended no such result and that this court in the San Jose opinion did not intend it.

We are aware that counsel for appellant makes this claim only in its relation to that part of the law which requires the Commissioner of Revenue to marshal the abandoned property and take it over under the proceedings prescribed in the act, and do not advance it as against escheat proceedings which counsel insist must be the sole procedure.

However, that only raises the question which we have already discussed relative to the right of the legislature to designate and limit the powers and duties of the Commissioner, and to appoint him in the first place.

Contra-doctrine.

Assuming for the moment that the San Jose opinion is all that its votaries claim for it, and that we are wrong in our contention that an escheat of a bank deposit as such is not involved in this case, and also assuming that the Kentucky statute authorizes escheat proceedings of money or other property on deposit in the bank, the question is then presented as to how far the opinion in the San Jose case controls decision in the case at bar.

It seems to us that the logical and rational approach to a discussion of this subject is most clearly and simply outlined in *McClellan v. Chipman*, 164 U. S. 347:

Mr. Justice White, writing in that case, after stating the general rules announced in *National Bank v. Commonwealth*, 9 Wall. 362, and *Davis v. Elmira Savings Bank*, *supra*, said:

“These two propositions, which are distinct, yet harmonious, practically contain a rule and an exception, the rule being the operation of general state laws upon the dealings and contracts of national banks, the exception being the cessation of the operation of such laws whenever they expressly conflict with the laws of the United States or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the laws of the United States.” (emphasis ours)

Thus this court lays down a formula declaring a rule and an exception, the exception falling into three distinct classifications:

1. When the state law expressly conflicts with a law of the United States.
2. When it frustrates the purpose for which National banks are created.
3. When the state law impairs the efficiency of the bank to discharge the duties imposed upon it by the laws of the United States.

We will discuss the exceptions in their order.

The only act of Congress with which the Kentucky law could possibly conflict is the National Bank Act.

Appellant's contention seems to be that the sole power to prescribe how long a bank may hold an unclaimed deposit abides in Congress. Well, if it does, Congress has failed to act. There is no provision whatsoever in the National Bank Act regulating or prescribing the length of time a National bank may hold a so-called inactive deposit. It could not so prescribe if it were disposed to do so.

The opinion in the San Jose case, despite the language quoted, does not prescribe the time. The opinion does say that "obviously, it attempts to qualify *in an unusual way* agreements between National banks and their customers, long understood to arise when the former received deposits under their plainly granted powers." (emphasis ours)

The words "in an unusual way" do not help much but, however that may be, it is difficult to discover in what way any procedure whatever taken under the Kentucky law

could qualify the contract of deposit between the appellant bank and one of its missing depositors. All the bank is asked to do is to recognize the legal representative of the absentee and honor his demand for performance of the contract of deposit.

Of course, if it is the law that the absentee is not entitled to be represented as a incapable person, the bank may undoubtedly reap its unearned profit, until Congress itself, or the courts, do something about it.

As to the second exception—*frustration of the purposes for which the appellant bank was created*.

It cannot be assumed that the bank was created for the purpose of operating on abandoned deposits, or to profit by chance or accident, or the misfortunes of its customers. Neither can it be assumed that Congress intended to create a Federal instrumentality for the purpose of evading state law providing for the descent and distribution of property.

We appreciate the absurdity of these assumptions, but they are nevertheless real in view of the construction given to the San Jose opinion.

As to the third exception—*impairing the efficiency of the bank to discharge the duties imposed upon it by the laws of the United States*.

We are inclined to the view that the principal duty imposed upon National banks by the laws of the United States is to perform its contracts with its customers. We do not believe that Congress contemplated that a National bank should add to its efficiency by acquiring and freezing

unearned property. Neither do we believe that the opinion of this court in the San Jose case means that. Further, we do not believe that Congress intended to create a Federal instrumentality whose efficiency would be increased through downright forfeiture of the property of its customers.

The contention of the advocates of the claimed doctrine of the San Jose case seem to argue that unless a National bank retains control of its customers' deposits under all circumstances, its purpose would not be fulfilled and others might hesitate to subject their funds to possible confiscation.

If the National Bank Act contained some provision, which it does not, prescribing a length of time, and under what circumstances, a National bank could refuse to honor a demand made by the legal representative of the absentee depositor, there might be some force to this contention. The sole question then would be that of the delegated power of Congress to enact such legislation.

This subject has been well treated in other briefs filed in this case, and we will not pursue it further.

The assumption in the immediately foregoing discussion is an unwarranted one because no question of escheat is involved and the decision in the San Jose case does not apply.

The basis of all escheat laws, several times emphasized in this brief, cannot be brushed aside. If it should be, the whole foundation of escheat laws is wrecked.

If the doctrine of *Marine Bank v. Fulton Bank*, supra, is overruled or ignored, the elaborate system of banking

throughout the United States, with all of its incidents, practices, customs and usages will be upset. Also the doctrine in that case is too sound to be disturbed.

We insist that there is no real and substantial conflict between the escheat law of Kentucky, or any other like law of escheat, and the National Bank Act. That, properly construed, they would harmoniously coexist and accomplish the intent and purposes of each in their respective fields of operation. More than that, a law of escheat would be found a workable and equitable instrument for the use of National banks in clearing away unclaimed or abandoned accounts which are always a dead weight on any prosperous business. State banks, and other depository institutions, have found it useful and convenient. There is no reason why National banks should not do so.

It is perhaps unfortunate that the several states do not have a uniform law of escheats. Probably they will never have one until someone takes the initiative as has been done in the case of other laws, both substantive and adjective. It would not seem that there is anything substantially wrong in the substantive provisions of escheat laws in general. It is only the procedural provisions which vary so much as to cause doubt and confusion.

The increasing need and importance of state laws relating to abandoned property is manifest on every hand. The greatly increased volume of personal property in the country adds to the necessity. The greatly multiplied activities and movements of the people in this machine age are causing a tremendous increase in accidental death. Wars have played their part. The Constitution of the United States places upon states not only the duty, but the burden of

governing and regulating the descent and distribution of this type of property.

It is obvious that the burden of the state is made heavier when Federal agencies and instrumentalities throw obstacles in the way of the operation of state laws. Comity between such agencies, the necessity of which this court has so frequently stressed, becomes more or less of a mockery and detrimental to the public interest.

We submit that all of the controversies of the past few years are unwarranted, and have been from the start. General principles announced by this court have received an unwarranted construction in their application to special conditions. The controversy did not start with the opinion in the San Jose case, but that opinion did precipitate things. It motivated rulings of the Comptroller of the Currency that National banks, solvent or insolvent, were not subject to state laws of escheat. National banking interests, who have avowedly taken an interest in the instant case, have seized upon the San Jose opinion as declaring their immunity from these state laws.

Our advice and opinion, given of course strictly as *amicus curiae* in this case, is that this court might consider the advanced position announced in all opinions of members of this court in *Graves v. New York, ex. rel. O'Keefe*, 306 U. S. 466, and conclusively and finally quiet this involved and unfortunate controversy. We feel that it would not be difficult to take the whole false structure and put it on a solid foundation; one that would be unimpeachable.

We feel warranted in advancing a suggestion to National banks and to the Comptroller of the Currency on the general

subject here discussed. We believe that national banks in their zeal to detach themselves as far as possible from the operation of state laws, have made and are making a serious mistake in the light of banks and banking.

Likewise, we believe that the Comptroller of the Currency, in assuming its present attitude on this question, is performing a distinct disservice to National banks throughout the country. Mature reflection should convince these interests that their position works directly to the advantage of state banks and is actually discriminatory against National banks.

When it becomes common knowledge of the investing and depositing public that state laws, particularly so-called laws of escheat, with their protecting and conserving provisions, are not applicable to National banks, there is bound to be a reversal of opinion. In other words; no person of good judgment would voluntarily enter into a contract of deposit with any bank if he knew that in case of his disappearance or the happening of some untoward event, his contract of deposit could not be properly represented; that if there were no person in existence entitled to petition for the appointment of a legal representative of his estate, the bank could indefinitely retain his deposit and the contract of deposit would remain unperformed on the part of the bank. If the depositor intended, in such an eventuality, that the bank itself should represent him indefinitely, and if he should never appear and was relieved from his liability under the contract, it is to be assumed that such an arrangement would be embodied in the contract itself. Naturally, that would be an unusual arrangement and one not contemplated in the ordinary contract of deposit of money in the bank.

CONCLUSION

We respectfully submit that the decision of the Court of Appeals of the Commonwealth of Kentucky should be affirmed.

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FILE COPY

In the Supreme Court

OF THE
United States

OCTOBER TERM, 1943

No. 154

ANDERSON NATIONAL BANK, etc.,

Appellant,

VS.

H. CLYDE REEVES, individually and as
Commissioner of Revenue of the
State of Kentucky, etc., et al.,

Respondents.

Appeal from the Court of Appeals of the State of Kentucky.

BRIEF AND ARGUMENT

Filed by the State of California, As Amicus Curiae.

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PRELIMINARY STATEMENT

The State of California files this brief as *amicus curiae* in support of the position of respondents.

The State of California has a special interest in the question involved because it, also, has escheat statutes which apply to national banks as well as to state banks. Sections 1273 and 1272 of the California Code

of Civil Procedure and Section 15 of the Bank Act of California, General Laws, Act 652, which set out the California escheat laws, appear in the appendix.

These statutes provide for the escheat of abandoned accounts after a period of twenty years and also for a proceeding by which claimants may recover from the state their interest in said accounts.

California is particularly interested in this proceeding because the appellants base their contention on the case of *First National Bank of San Jose v. State of California*, 262 U.S. 366, which held that the California statutes could not be applied to abandoned accounts on deposit with national banks, although it was subsequently held that the statutes could be applied to abandoned accounts on deposit with state banks. *Security Savings Bank v. State of California*, 263 U.S. 282.

ARGUMENT.

I.

THE RATIONALE OF FIRST NATIONAL BANK OF SAN JOSE v. STATE OF CALIFORNIA IS BASED ON AN EXTENSION OF THE RULE LAID DOWN IN McCULLOCH v. MARYLAND, WHICH HAS SINCE BEEN MODIFIED BY THIS COURT.

In the "San Jose case" this court, speaking through Justice McReynolds, pointed out that national banks were instrumentalities of the federal government; that they performed their functions by accepting deposits of money; that although "their contracts and dealings are subject to the operation of general and indiscriminatory state laws which do not conflict with

the letter or the general object and purposes of congressional legislation * * * any attempt to define their duties or control the conduct of their affairs is void whenever it conflicts with the laws of the United States or frustrates the purposes of the national legislation or impairs the efficiency of the bank to discharge the duties for which it was vested". (262 U.S. 368, 369.)

Of course, we have no quarrel with this general rule.

In support of this general rule three cases were cited by the court: *Davis v. Elmira Savings Bank*, 161 U.S. 275, 283, 288, 290; *Farmers' & M. Nat. Bk. v. Dearing*, 91 U.S. 29, 33, 34; and, *Easton v. Iowa*, 188 U.S. 220, 229.

The case of *Davis v. Elmira Savings Bank*, *supra*, held that the New York insolvency law granting certain preferences on liquidation fell before the provisions of Revised Statutes 5236, 5342, which compelled a ratable distribution of the assets of insolvent national banks. In other words, the Congress which created the national banks controlled their liquidation.

In the case of *Farmers' & M. Nat. Bk. v. Dearing*, *supra*, the attack was on a state statute providing for a penalty for usury which was greater than the penalty under the National Bank Act. Congress having acted within its field the state statute could not be applied.

Easton v. Iowa, *supra*, was concerned with the penal provisions of a state statute making it an offense for

an insolvent bank to receive deposits. This court held that the organization, determination of insolvency and liquidation of national banks were provided for by congressional enactment and that it was "a symmetrical and complete scheme".

The three state statutes which were under attack in the above case were laws which ran directly afoul of congressional legislation in a field in which Congress was supreme.

The fulcrum used to support the rationale of the court in the "San Jose case" is really to be found in the epigrammatic statement of Marshall, in the case of *M'Culloch v. Maryland*, 4 Wheat. 316:

"the power to tax involves the power to destroy."

Here is an illustration of government by slogan.

M'Culloch v. Maryland, *supra*, was followed with emphasis in *Osborn v. Bank of U. S.*, 9 Wheat. 738.

In each of these cases the court struck down state taxing statutes which attempted to levy taxes on the right of a federal instrumentality, the Bank of the United States, to perform the very governmental function assigned to it by the Congress. The taxing statutes in question were aimed directly at the Bank of the United States and even a cursory knowledge of the history of the time discloses that the purpose of these statutes was to cripple the bank and destroy its effectiveness and thus thwart the Congress in the exercise of one of the functions of the new federal state.

Thus, when Marshall spoke,

"the power to tax involves the power to destroy"

he was not epitomizing a philosophy, he was striking at a fact which presented an imminent peril to the proper exercise of a governmental function.

Using the quoted words of Marshall as a text, the process of "judicial exegesis" set in until in the "San Jose case", this court struck down an ordinary statute (some counterpart of which exists in every state) providing indiscriminately for the escheat to the state of abandoned property.

Indeed, the labor of the judicial exegete became so vigorous that Justice Holmes was forced to protest in the case of *Panhandle Oil Co. v. Mississippi, ex rel. Knox*, 277 U.S. 218, and he there stated:

"The power to tax is not the power to destroy while this court sits."

Justice Frankfurter took up this note of dissent in his concurring opinion in the case of *Graves v. New York*, 306 U.S. 466, 490:

"All these doctrines of intergovernmental immunity have until recently been moving in the realm of what Lincoln called 'pernicious abstractions'. The web of unreality spun from Marshall's famous dictum was brushed away by one stroke of Mr. Justice Holmes' pen: 'The power to tax is not the power to destroy while this Court sits.'"

Into this "web of unreality" the ordinary escheat statutes of the several states have been drawn via the

“San Jose case” and from this web we now ask this court to extricate them.

II.

THE NATURE OF ESCHEAT LAWS AND THEIR GENERAL APPLICATION.

There are many authorities to the effect that the state has the sole and exclusive power over the disposition of property under its jurisdiction.

United States v. Fox, 94 U.S. 315;

Sunderland v. United States, 266 U.S. 226;

United States v. Perkins, 163 U.S. 625;

Beaver v. Short, 300 Fed. 113.

In the case of

Hamilton v. Brown, 161 U.S. 256,

the Supreme Court of the United States lays down the rule as follows (at p. 263):

“By the law of England, before the Declaration of Independence, the lands of a man dying intestate and without lawful heirs reverted by escheat to the King as the sovereign Lord; but the King's title was not complete without an actual entry upon the land, or judicial proceedings to ascertain the want of heirs and devisees. *Attorney General of Ontario v. Mercer*, 8 App. Cas. 767, 772, 2 Bl. Com. 245. The usual form of proceeding for this purpose was by an inquisition or inquest of office before a jury, which was had upon a commission out of the Court of Chancery, but was really a proceeding at common law; and, if it resulted in favor of the King, then, by virtue of ancient statutes, any one claiming title in the lands might, by leave

of that court, file a traverse, in the nature of a plea or defence to the King's claim, and not in the nature of an original suit. Lord Somers, in *The Bankers' case*, 14 Howell's State Trials, 1, 83; Ex parte Webster, 6 Ves. 809; Ex parte Gwydir, 4 Maddock, 281; In re Parry, L. R. 2 Eq. 95; *People v. Cutting*, 3 Johns. 1; *Briggs v. Light-Boats*, 11 Allen, 157, 172. The inquest of office was a proceeding in rem; when there was a proper office found for the King, that was notice to all persons who had claims to come in and assert them; and, until so traversed, it was conclusive in the King's favor. Bayley, J., in *Doe v. Redfern*, 12 East, 96, 103; 16 Vin. Ab. 86, pl. 1.

"In this country, when the title to land fails for want of heirs and devisees, it *escheats to the State* as part of its common ownership, either by mere operation of law, or upon an inquest of office, *according to the law of the particular State*. 4 Kent Com. 424; 3 Washb. Real Prop. (4th Ed.) 47, 48." (Emphasis supplied.)

See also,

United States v. Repentigny, 72 U.S. 211.

Even money deposited in the United States Treasury when an escheat occurs escheats to the state where it was originally situated.

United States v. Klein, 303 U.S. 276;

American Loan & Trust Co. v. Grand Rivers Co., 159 Fed. 775.

Statutes providing for escheat have been held to be part of the intestate laws of a state.

Peo. v. Richardson, 269 Ill. 275, 109 N.E. 1033;
29 *Harvard Law Review*, 455.

This being the case it is all the more evident that there can be no federal escheat statute. Laws governing the devolution of property have always been the subject of exclusive state jurisdiction.

Cardozo, when sitting on the New York Court of Appeals, said:

"The state as the ultimate owner is in effect the ultimate heir. * * *

"Now the feudal tenures are abolished () and all lands within the state are declared to be allodial (). What was once an incident of tenure has become an incident of sovereignty. * * * 'In personal estates, which are allodial by law, the king,' said Lord Mansfield (), 'is last heir where no kin.' With tenures abolished, succession is by light right whether the subject of escheat is personal estate or real."

In re Melrose Ave. in Borough of the Bronx,
234 N.Y. 48, 136 N.E. 235.

By the Tenth Amendment to the Constitution of the United States all powers not delegated to the United States nor prohibited to the states are reserved to the states. By this reservation the rights of sovereignty are guaranteed to the states by the Constitution. Ordinarily no act of Congress can subtract an attribute of sovereignty from a state.

III.

THE ORDINARY ESCHEAT STATUTES DO NOT INTERFERE WITH THE GOVERNMENTAL FUNCTIONS OF NATIONAL BANKS NOR DO THEY INTERFERE WITH THE CONTRACT BETWEEN THE BANK AND ITS DEPOSITORS.

We recognize that the Congress is empowered to borrow money; that implied from this power is the right to set up a national banking system; that it may therefore provide for a complete and symmetrical system for the organization, government and liquidation of national banks; and, that if the Congress wished to prescribe the terms of a contract between a national bank and its depositors, it could do so.

However, the Congress has not attempted to prescribe the terms of the contract of deposit between a depositor and a national bank.

Indeed, this court so stated in the "San Jose case":

"These banks are instrumentalities of the Federal government. Their contracts and dealings are subject to the operation of general and indiscriminating state laws which do not conflict with the letter or the general object and purposes of congressional legislation." (262 U.S. 369.)

The effect of an escheat statute on the relationship between a bank and its depositors is set out in the case of *German town Tr. Co. v. Powell*, 265 Pa. 71, at page 77:

"The agreement of the bank or depositary, however, is merely to keep the money of the depositor until it is demanded by the owner, or his duly authorized representatives. It agrees to pay on demand. When demand is made the contractual

relation ceases, there being no vested right to continue the contract in force thereafter, or for any definite time. If the depositor should die or make an assignment, his personal representative or assignee succeeds to his right to make demand for the money and the bank is in duty bound to make payment. A statute of escheat, in effect, simply provides for a termination of the contract of deposit, at the instance of the Commonwealth and by virtue of its sovereign power, where there are no heirs to claim the property, after the death of the owner, or after expiration of such reasonable time as may be fixed by law to raise a presumption of death. While the act requires the filing of certain reports for the information of the Commonwealth a considerable time before an escheat is declared, this provision is reasonable and enables the Commonwealth to follow up property as to which there is no apparent claim of ownership. The right of escheat has been recognized under the English law from the earliest times and has also been the subject of continuous statutory regulation in Pennsylvania from colonial days, the latest general law on the subject being the Act of May 2, 1889, P. L. 66; the validity of these acts has been sustained without suggestion that their enforcement violates any contract between the owner of the property and the person or institution in whose hands the property was deposited or placed for keeping.

The California escheat statute is nothing more than an assertion by the state of its sovereign right to take possession of abandoned property. The statute is not aimed at national banks but operates indiscriminately on all property within its borders.

Nor can it be said that such a statute frustrates the purposes or impairs the efficiency of a bank. State banks have been subject to such statutes and no one has contended that the statutes have impaired their efficiency. If such statutes had reacted unfavorably on the competitive position of the state banks, the state legislature would undoubtedly have given them relief.

We do not believe that the efficiency of national banks depends on their ability to retain indefinite possession of abandoned accounts. The accounts of those active in trade and commerce are the life blood of any bank, state or national. Small, inactive accounts are notoriously unprofitable. Such dormant accounts are a constant temptation to peculations on the part of minor employees.

Escheat statutes are not unlike statutes of succession. The state stands in the place of the owner of abandoned property just as an administrator or executor stands in the place of the deceased owner of property. If an executor or administrator withdraws the decedent's money from the bank, he reduces the amount of available funds on deposit in the bank and to some degree lessens its ability to lend money to the government. But no one would contend this would affect the operations of the bank.

A receiver of a corporation appointed by a state court in accordance with state law might withdraw

from a national bank funds under his control as receiver. But by such act he would not be interfering with the governmental functions of the bank.

A sheriff armed with a writ of attachment, or garnishment, or execution, or any one of a number of other writs could vitally affect the contract between the bank and the depositors. However, if a national bank was involved, could it be seriously said that the sheriff was interfering with the bank's performance of an essential governmental function?

CONCLUSION.

We believe that this court should review the decision in the "San Jose case".

The states operating under escheat statutes are not attacking national banks or their functions. Nor are the states attempting to thwart the national government in its efforts to borrow money. In California the state government has upwards of \$155,000,000 on deposit in national banks and holds an investment of \$150,000,000 in government bonds.

The writers of this brief are not among the devotees at the shrine of "state rights". We are sympathetic with every effort of the federal government to exercise its functions. We do not believe, however, that the necessities of the federal government require it to

strike down the escheat laws of the several states enacted under their sovereign powers.

The judgment should be affirmed.

Dated, San Francisco, California,
December 27, 1943.

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(Appendix Follows.)

Appendix

California Code of Civil Procedure, Section 1273.

All amounts of money heretofore or hereafter deposited with any bank to the credit of depositors who have not made a deposit on said account or withdrawn any part thereof or the interest, and which shall have remained unclaimed for more than twenty years after the date of such deposit, or withdrawal of any part of principal or interest, and where neither the depositor nor any claimant has filed any notice with such bank showing his or her present residence, shall, with the increase and proceeds thereof, escheat to the state.

Whenever the attorney-general shall be informed of such deposits, he shall commence an action or actions in the name of the State of California, in the superior court for the county of Sacramento, in which shall be joined as parties the bank or banks in which the moneys are deposited and the names of all such depositors. All or any number of depositors or banks may be included in one action.

Service of process in such action or actions shall be made by delivery of a copy of the complaint and summons to the president, cashier or managing officer of each defendant bank, and by publication of a copy of such summons in a newspaper of general circulation published in said county for a period of four weeks.

Upon the trial the court must hear all parties who have appeared therein and if it be determined that

the moneys deposited in any defendant bank or banks are unclaimed as hereinabove stated, then the court must render judgment in favor of the state declaring that said moneys have escheated to the state and commanding said bank or banks to forthwith deposit all such moneys with the state treasurer, to be received, invested, accounted for and paid out in the same manner and by the same officers as is provided in the case of other escheated property.

California Code of Civil Procedure, Section 1272.

Within five years after judgment in any proceeding had under this title, a person not a party or privy to such proceeding may file a petition in the superior court of the county of Sacramento, showing his claim or right to the property, or the proceeds thereof.

Said petition shall be verified, and, among other things must state:

The full name, and the place and date of birth of the decedent whose estate, or any part thereof, is claimed.

The full name of such decedent's father and the maiden name of his mother, the places and dates of their respective births, the place and date of their marriage, the full names of all children the issue of such marriage, with the date of birth of each, and the place and date of death of all children of such marriage who have died unmarried and without issue.

Whether or not such decedent was ever married, and if so, where, when and to whom.

How, when and where such marriage, if any, was dissolved.

Whether or not said decedent was ever remarried, and, if so, where, when and to whom.

The full names, and the dates and places of birth of all lineal descendants, if any, of said decedent; the dates and places of death of any thereof who died prior to the filing of such petition; and the places of residence of all who are then surviving, with the degree of relationship of each of such survivors to said decedent.

Whether any of the brothers or sisters of such decedent ever married, and, if so, where, when and whom.

The full names, and the places and dates of birth of all children the issue of the marriage of any such brother or sister of decedent, and the date and place of death of all deceased nephews and nieces of said decedent.

Whether or not said decedent, if of foreign birth, ever became a naturalized citizen of the United States, and if so, when, where and by what court citizenship was conferred.

The post-office names of the cities, towns or other places, each in its appropriate connection, wherein are preserved the records of the births, marriages and deaths hereinbefore enumerated, and, if known, the title of the public official or other person having custody of such records.

If for any reason, the petitioner is unable to set forth any of the matters or things hereinabove required, he shall clearly state such reason in his petition.

A copy of such petition must be served on the attorney general at least twenty days before the hearing of the petition, who must answer the same.

And the court thereupon must try the issue as issues are tried in civil actions, and if it is determined that such person is entitled to the property, or the proceeds thereof, it must order the property, if it has not been sold, to be delivered to him, or if it has been sold and the proceeds paid into the state treasury, then it must order the controller to draw his warrant on the treasury for the payment of the same, but without interest or cost to the state, a copy of which order, under the seal of the court, shall be a sufficient voucher for drawing such warrant.

All persons who fail to appear and file their petitions within the time limited are forever barred; saving, however, to infants, and persons of unsound mind, the right to appear and file their petitions at any time within the time limited, or within one year after their respective disabilities cease.

Section 15 of the California Bank Act.

All amounts of money heretofore or hereafter deposited with any bank to the credit of depositors who have not made a deposit on said account or with-

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drawn any part thereof or the interest and which shall have remained unclaimed for more than twenty years after the date of such deposit, or withdrawal of any part of principal or interest, and where neither the depositor nor any claimant has filed any notice with such bank showing his or present residence, shall, with the increase and proceeds thereof, be deposited with the state treasurer after judgment in the manner provided in the Code of Civil Procedure. At the time of issuing the summons in the action provided for in section one thousand two hundred seventy-three of the Code of Civil Procedure, the clerk shall also issue a notice signed by him, giving the title and number of said action, and referring to the complaint therein, and directed to all persons, other than those named as defendants therein, claiming any interest in any deposit mentioned in said complaint and requiring them to appear within sixty days after the first publication of such summons, and show cause, if any they have, why the moneys involved in said action should not be deposited with the state treasurer as in said section provided, and notifying them that if they do not so appear and show cause, the state will apply to the court for the relief demanded in the complaint. A copy of said notice shall be attached to and published with a copy of said summons required to be published by said section, and at the end of the copy of such notice so published there shall be a statement of the date of first publication of said summons and notice. Any person interested may appear in said action and become a party thereto. Upon the completion of the

publication of the summons and notice, and the service of the summons on the defendant bank, or banks, as in said section one thousand two hundred seventy-three of the Code of Civil Procedure provided, the court shall have full and complete jurisdiction over the state, and the said deposits and of the person of everyone having or claiming any interest in the said deposits, or any of them, and shall have full and complete jurisdiction to hear and determine the issues therein, and render the appropriate judgment thereon.

Statement concerning deceased depositors and accounts dormant twenty years.

The president or managing officer of every bank must, within fifteen days after the first day of January of every year, return to the superintendent of banks and to the state controller a sworn statement showing the names of depositors known to be dead, or who have not made further deposits, or withdrawn any moneys during the preceding twenty years and not known to be living, and the amount of whose deposit is more than ten dollars. Such statement shall show in detail the following matters: viz.:

First—The name and last known place of residence or postoffice address of the person making such deposit;

Second—The amount and date of such deposit, and whether the same are in moneys or securities, and if the latter, the nature of the same;

Third—The interest due on such deposit, if any, and the amount thereof;

Fourth—The sum total of such deposit, together with the interest added thereto due from such bank on account of such deposit or deposits and the interest thereon to such depositor, but nothing contained herein shall require any corporation or person renting lock boxes or safes in vaults for storage purposes to open or report concerning property stored therein. Such reports itemized as aforesaid shall be signed by the person making the same and shall be sworn to before a person competent to administer oaths as a full, complete and truthful statement of each of the items therein contained.

Statement concerning deceased depositors and accounts dormant ten years.

The president or managing officer of every bank, must within fifteen days after the first day of January of every odd-numbered year, return to the superintendent of banks a sworn statement showing the names of depositors known to be dead, or who have not made further deposits, or withdrawn any moneys during the preceding ten years and not known to be living, and the amount of whose deposit is more than ten dollars. Such statements shall show the amount of the account, the depositor's last known place of residence or postoffice address, and the fact of death, if known to such president or managing officer. Such president or managing officer must give notice of these deposits in one or more newspapers published in or nearest to the town or city where such bank has its principal place of business, at least once a week for four con-

secutive weeks, the cost of such publication to be paid pro rata out of such unclaimed deposits. The superintendent of banks must incorporate in his subsequent report such returns made to him as provided in this section. If any president or managing officer of any bank neglects or refuses to make the sworn statements required by this section such bank shall forfeit to the state of California the sum of one hundred dollars a day for each day such default shall continue. Any president or managing officer of any bank who violates any of the provisions of this section shall forfeit to the state of California the sum of one hundred dollars a day for each and every day such violation shall continue. For the purposes of this section all deposits received by any bank under the provisions of section thirty-one, section thirty-one *a* or section thirty-one *b* of this act shall be deemed to have been deposited with such bank at the time the deposit was made with the bank from which the deposit was transferred; provided, that any bank which shall make any deposit with the state treasurer in conformity with the provisions of this section shall not thereafter be liable to any person for the same and any action which may be brought by any person against any bank for moneys so deposited with the state treasurer shall be defended by the attorney general without cost to such bank. (Amended by Stats. 1913, p. 145; Stats. 1915, p. 1106; Stats. 1921, p. 1365; Stats. 1925, p. 510.)

Annotation: See 4 Cal.Jr. 230; note, 31 A.L.R. 398 (constitutionality of statutes relating to disposition of old bank deposits).

This section satisfied the requirements as to due process of law: *Security Sav. Bank v. State*, 263 U.S. 282, 31 A.L.R. 391, 68 L. Ed. 301, 44 Sup. Ct. 108.

This section and Code Civ. Proc. p. 1273, are correlative and deal with the same subject matter: *State v. Security Savings Bank*, 186 Cal. 419, 199 Pac. 791; affirmed 263 U.S. 282, 31 A.L.R. 391, 68 L. Ed. 301, 44 Sup. Ct. 108. See, also, *Matthews v. Savings Union Bank & Trust Co.*, 43 Cal. App. 45, 184 Pac. 418.

This section and Code Civ. Proc. p. 1273, providing for escheat to the state of deposits in banks where no entries or withdrawals have been made for twenty years and the whereabouts of the depositors are unknown, attempt to qualify agreements between national banks and their customers with respect to deposits which banks are authorized to receive under Rev. Stats. p. 5136, and are invalid: *First Nat. Bank of San Jose v. State*, 262 U.S. 366, 67 L. Ed. 1030, 43 Sup. Ct. 602.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1943

No. 154

ANDERSON NATIONAL BANK, SUING ON BEHALF OF ITSELF
AND ALL OTHERS SIMILARLY SITUATED, *Appellants,*

vs.

H. CLYDE REEVES, INDIVIDUALLY AND AS COMMISSIONER OF
REVENUE OF THE STATE OF KENTUCKY, ETC., ET AL.,

Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF
KENTUCKY.

BRIEF AMICI CURIAE

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PRELIMINARY STATEMENT

This brief is submitted on behalf of Northwestern National Bank of Minneapolis, First National Bank of Minneapolis, The First National Bank of Saint Paul, First Wisconsin National Bank of Milwaukee and Marine National Exchange Bank of Milwaukee, *amici curiae*, each of which is interested in the determination of this case because of the fact that the legislatures of Minnesota and Wisconsin have enacted legislation similar to the Kentucky statute here involved (Laws of Minnesota 1943, chapter 620, and Wisconsin Statutes 1941, Section 220.25).

The validity of such legislation is of interest to national

banks generally in view of the fact that statutes similar in character to the Kentucky statute have been enacted in many states, including California, Pennsylvania, Michigan, Wisconsin and Minnesota. Since the decision of this court in *First National Bank of San Jose vs. California*, 262 U. S. 366, no statute similar to the Kentucky statute under consideration in this case has been enforced against national banks.

ARGUMENT

Point I.

An Analysis of the Holding of the Court of Appeals of Kentucky in the Instant Case and the Holding of This Court in *First National Bank of San Jose vs. California*.

In its opinion in the instant case the Court of Appeals of Kentucky fully recognizes the validity of the general rules of law upon which *First National Bank of San Jose vs. California*, 262 U. S. 366, rests. The Kentucky court says:

"The question of validity of the Act as applied to national banks must be approached in the light of the limitations applicable to state legislation affecting such institutions. National banks are amenable to state laws as are other institutions if such laws do not interfere with their functions in such manner as to conflict with the general objects and purposes of the National Banking Act. *First National Bank of Elizabethtown vs. Conn.*, 187 Ky. 151, 219 S. W. 175; *McCiellan vs. Chipman*, 164 U. S. 347, 41 L. ed. 461; *First National Bank of San Jose vs. Calif.*, 262 U. S. 366, 67 L. ed. 1030. • • • But, as said in *First National Bank of San Jose vs. Calif.*, *supra*, any attempt by a state to define their duties or control the conduct of their affairs is void whenever it conflicts with the laws of the United States or frustrates the purposes of the national legislation or impairs the efficiency of the bank to discharge the duties for which it was created. *Davis vs. Elmira Sav. Bank*, 161 U. S. 275, 40 L. ed. 700, 16 Sup. Ct. Rep. 502."

We contend, however, that the Kentucky court has misconstrued the holding of the *San Jose case*. In its opinion the Kentucky court concludes:

"Thus it seems that the California statutes were held invalid as to national banks because they were deemed by the court to be *escheat* statutes confiscating the deposits solely by reason of *dormancy*."

This conclusion is based upon the following sentence appearing in the *San Jose case*:

"The success of almost all commercial banks depends upon their ability to obtain loans from depositors, and these might well hesitate to subject their funds to possible confiscation."

A careful reading of the opinion in the *San Jose case* will demonstrate that what this court actually held was that:

"Plainly, no state may prohibit national banks from accepting deposits or directly impair their efficiency in that regard. And we think, under circumstances like those here revealed, a state may not dissolve contracts of deposit even after twenty years, and require national banks to pay to it the amounts then due; the settled principles stated above oppose such power." (262 U. S. 366, 369.)

In other words, this court held that a state may not dissolve contracts of deposit between a national bank and its depositors even after twenty years of dormancy. It did not hold that confiscation of property was the vice of the California statute as the Kentucky court seems to think. That confiscation was not the vice of the California act is shown by the fact that in *Security Savings Bank vs. California*, 263 U. S. 282, this court upheld the validity of the California act in a proceeding involving a state bank. If confiscation results when the state takes deposits from a national bank, confiscation also results when the state takes them from a state bank. The holding of the *San Jose case* is that a state cannot take deposits from a national bank—whether it par-

ports to acquire the title of the depositor or to take the money as custodian—because the act of the state would constitute an interference with the operation of the bank, and such act would be in conflict with the general objects and purposes of legislation of Congress dealing with the creation and maintenance of national banks as Federal instrumentalities.

In speaking of confiscation in the *San Jose case* the court undoubtedly meant that the act which made deposits

“subject to seizure by the state where the bank happened to be located”

was so inimical to the interests of depositors that it would deter them from loaning money to the bank and therefore prevent its successful operation. This is the only reasonable interpretation of the statement made by the court.

A brief consideration of the Kentucky act demonstrates that it operates to dissolve the deposit agreement between the depositor and the bank and that it is even more inimical to the interests of depositors than the California act.

Kentucky Revised Statutes 393.010 and 393.060 to 393.990, inclusive, which are printed in the appendix to this brief, may be summarized as follows:

1. K. R. S. 393.090 provides that demand deposits are presumed abandoned after being inactive for a period of *ten years*.

2. K. R. S. 393.110 requires all banks to report annually to the Department of Revenue all property held by them presumed to be abandoned, such report to include the name of the owner, his last known address, the amount and kind of property and such other information as the Department may require. The sheriff is required to post a copy of this report on the courthouse door. This is the only notice required to be given to the property owner. Thereafter between November

1 and November 15 of each year each bank must turn over to the Department of Revenue all property so reported.

3. K. R. S. 393.130 provides that any person transferring property to the Department of Revenue under the provisions of the act is relieved from liability to the owner.

4. K. R. S. 393.230 provides that the Commissioner of Revenue may institute proceedings at any time after the state receives the property to establish conclusively that the property was actually abandoned or that the owner has died and that there is no person entitled to it.

5. K. R. S. 393.140 provides that after conclusion of the proceeding authorized by K. R. S. 393.230 any person who was not served and who did not appear and whose claim was not considered by the court may file a claim with the Department of Revenue within five years. (The California act had a similar provision. See *Security Sav. Bank vs. California*, 263 U. S. 282, 285.)

The Kentucky act therefore operates to dissolve the deposit contract after *ten years* of inactivity and requires the bank to pay to the state the amount then due the depositor. Such dissolution of contract occurs prior to the institution of any action and without any determination that the depositor has died and that no heirs or legatees have succeeded to his interest. Surely the Kentucky act "attempts to qualify in an unusual way agreements between national banks and their customers long understood to arise when the former receive deposits under their plainly granted powers," and brings about one of the evils which the court in the following statement recognized as imminent if states were permitted to legislate on this subject:

"If California may thus interfere other states may do likewise; and, instead of twenty years, varying limitations may be prescribed,—three years perhaps, or five, or ten, or fifteen. We cannot conclude that Congress intended to permit such results."

San Jose case, 262 U. S. 366, 370.

Moreover, the Kentucky act provides for the determination of actual abandonment, following which recovery is permitted only to a claimant who files a claim within five years and who was in no sense a party to the proceeding. *All right to the deposit may therefore be lost in fifteen years.* Can it be contended that the Kentucky act would be any less a deterrent to the receipt by a bank of loans from a depositor than the California act? We submit that the vice of the California act is greatly enhanced in the Kentucky act.

In this connection it is of interest to note that appellees contend that the Kentucky act is intended for the benefit of the depositor and such is the construction placed upon it by the Kentucky court. Actually, however, the depositor is not benefited. For the reasons hereafter enumerated the act is detrimental to the rights of the depositor.

1. Under the terms of the act the depositor, instead of being able to obtain his deposit from the bank on demand, must file a claim therefor with the Department of Revenue of the State of Kentucky and must thereupon within fifteen days publish a notice in a newspaper of general circulation in the county in which the property was held before being transferred to the state (K. R. S. 393.140), and the Commissioner of Revenue is then directed to hear evidence to determine the merits of the claim (K. R. S. 393.150). It is common knowledge that these dormant deposits are usually small in amount and the imposition of such procedural requirements with the attendant expense will effectively prevent

the recovery of many of these small deposits by their owners.

2. If the deposits are taken by the state the depositor loses the protection afforded by Federal Deposit Insurance Corporation, a Federal instrumentality through which Congress has provided insurance for all deposits in all national banks within the United States up to an amount of \$5,000 for each depositor (Act of August 23, 1935, c. 614, 49 Stat. 684; Title 12, U. S. C., §264). So long, therefore, as the deposit remains in a national bank the depositor may obtain the deposit on demand, without inconvenience or expense, and so long as he chooses to leave the deposit in the bank, he has the best possible protection—the insurance protection afforded him by the laws of the United States. It can, therefore, fairly be assumed that the depositor would prefer that his deposit remain in the bank subject at all times to his order, rather than that the deposit be appropriated by the state, thereby placing upon him the burden and expense of recovering it.

3. Under the terms of the act the depositor may lose the deposit entirely after a period of approximately fifteen years from the time the deposit became inactive. The state may take the money from the bank after the deposit has been inactive for ten years. Thereafter the state may institute a proceeding to establish conclusively that the money has been actually abandoned. Presumably the state may obtain an adjudication of actual abandonment without personal service on the depositor, and thereafter the depositor will lose all right of recovery from the state unless he files his claim with the Department of Revenue within five years (K. R. S. 393.140).

Clearly the depositor is in a worse position than if his money remained on deposit with the bank. There is no basis whatsoever upon which it can be contended that the act is beneficial to him. A more realistic characterization of the act would be that it is a revenue measure through which the state expects to receive for its own use a substantial amount of additional revenue.

We submit that the Kentucky court erred in its construction of the *San Jose case*. The operation of the Kentucky statute cannot be distinguished from the operation of the California statute. This court has held that a state cannot dissolve the deposit contract between a national bank and its customer and take the deposit because such action is in conflict with the objects and purposes of the legislation of Congress. The instant case must be decided in accordance with that principle.

Point II.

The San Jose Case Is Sound in Principle, and Is in Accord With Other Decisions of This Court.

In order that the importance of this case may be fully understood, the early history of banking in the United States must be considered. We believe the members of the court are sufficiently informed on this subject so that we need do no more than briefly summarize this early history:

From the beginning of our history as a nation, jurisdiction over banking was the subject of a long and bitter controversy between the federalists and the advocates of states rights. The latter contended that each of the states should have its own independent banking system and the federalists supported the establishment of the Bank of the United States. Throughout the period of this controversy the United States and its citizens suffered. There was no ade-

quate supervision of banks or bankers, speculation and inflation were rampant, bank failures were common, there was no adequate depository for Federal funds and there was no adequate instrumentality for the transfer of funds from one section of the country to another.

Since the passage of the National Bank Act (Rev. Stat., §5133, *et seq.*, U. S. C., Title 12, §21, *et seq.*) national banks throughout the country have been created and have carried on their operations under a uniform system of law and their existence and operation have been protected by this court. Under this protection banking facilities have grown, expanded and have been greatly strengthened. The National Bank Act has been amended and improved from time to time until today it provides the most complete, efficient and satisfactory system of banking which this country or any other country has ever had.

The *San Jose case* is one case in a long line of cases in which this court has refused to reopen the door to state interference with the operation of national banks. We respectfully submit that this court should protect the policy which has existed so long and worked so satisfactorily and that it should not now reopen the door to permit these ancient controversies concerning jurisdiction over national banks again to become rampant throughout this country.

Among the powers conferred upon national banks are the power to enter into contracts, to exercise all such incidental powers as shall be necessary to carry on the business of banking, and, specifically, the power to receive deposits (Rev. Stats., §5136, U. S. C., Title 12, §24).

Every consideration which motivated the court in reaching its conclusion in the *San Jose case* applies with equal force today. In the period of twenty years since this court held that Congress did not intend to permit a state to take inactive deposits from a national bank, Congress has not acted

to expand the field of state action or to indicate in any way that a state would be permitted to take such deposits. On the contrary, since the decision in the *San Jose case* Congress has created *Federal Deposit Insurance Corporation* (Act of Aug. 23, 1933, c. 614, 49 Stat. 684, 12 U. S. C., §264), through which Congress has provided insurance for the deposit of every depositor in every national bank in the United States. Can it now be argued that Congress intended to permit the states to provide protection for deposits in national banks by providing their own plan of insurance for such deposits or by taking the deposits from the banks? Surely the action of the state in taking inactive deposits from a bank for the alleged protection of depositors is more clearly outside the scope of permissible state action today than at the time the court in the *San Jose case* held that Congress did not intend to permit such action.

It is submitted that the court in the *San Jose case* could properly have reached no other conclusion. The setting aside of the contract between the bank and its depositor is a real interference with the activities of the bank. The statute in question qualified in an unusual way the contract between the depositor and the bank. It undertook to impose a new limitation upon the contract which was not within the contemplation of the parties. This argument is today of greater force than at the time the court rendered its decision because today banks and depositors have for twenty years relied upon the ruling in the *San Jose case*.

If a limitation of twenty years (or ten years in the instant case) should be put upon the period during which a national bank may retain inactive deposits and thereafter the depositor must undertake to recover from the state and incur the attendant expense, not only are the funds which the bank has available for use in carrying out its functions diminished, but it is extremely probable that the flow of de-

posits into the bank will be reduced because depositors will not welcome the prospect of having to proceed against the state to recover their money after a period of twenty years or ten years or some such lesser period as some other state may fix. This is a matter of greater concern to national banks than to other banks for the reason that the larger banks are as a rule national banks and their deposits are drawn from depositors who are residents of many states other than the state in which the particular bank carries on its business. These depositors instead of being able to rely upon the uniform federal laws regulating the affairs of national banks in this respect would be subject to the varying limitations of those states within which they deposited money in national banks.

The authorities which are cited in the opinion in the *San Jose case* indicate that the court had ample precedent for its decision. The examination which we have made of the prior decisions cited indicates that the court did not misconstrue or misquote these opinions. The fact that the court has referred to the *San Jose case* with approval in the following cases:

Security Savings Bank vs. California, 263 U. S. 282;

National City Bank vs. Philippine Islands, 302 U. S. 651;

Starr, Attorney General, vs. O'Connor, Comptroller of the Currency, 118 Fed. (2d) 541 (C. C. A.), Certiorari denied, 314 U. S. 695;

and that no statute similar in character to the act there involved has since been applied to deposits in a national bank are proof of the fact that the decision is not inconsistent with other decisions both prior and subsequent to it.

The State of Minnesota *amicus curiae* in its brief (page 5) in which the State of Wisconsin joins, contends that *National Bank vs. Commonwealth*, 76 U. S. (9 Wall.) 353, was

entirely overlooked by this court in the *San Jose case*. This case is the foundation of the argument made by the State of Minnesota. In fact, however, the brief of the State of California in the *San Jose case* cited and relied heavily upon *National Bank vs. Commonwealth, supra*. The failure of this court to mention it in its opinion in the *San Jose case* can be due only to the fact that it cited those cases which it regarded as the controlling precedents after having carefully considered the briefs and arguments of counsel and the cases cited to it.

In addition to *National Bank vs. Commonwealth*, the brief of the State of California cited *McClellan vs. Chipman*, 164 U. S. 347; *Provident Institution for Savings vs. Malone*, 221 U. S. 660; and *Waité vs. Dowlêy*, 94 U. S. 527, all of which are cited in the brief of the State of Minnesota.

The State of Minnesota in its brief (page 8) further contends that the court in the *San Jose case* proceeded upon the theory that the act there in question violated rights of both the depositor and the bank, and that the case is not in harmony with *Provident Institution for Savings vs. Malone, supra*; and *Security Savings Bank vs. State of California, supra*.

We find nothing in the opinion of this court in the *San Jose case* which furnishes support to the argument of the State of Minnesota. The decision is squarely on the point that the act conflicted with the general objects and purposes of the legislation of Congress. The brief of the State of California cited *Provident Institution for Savings vs. Malone, supra*, as authority for the power of a state to take inactive or unclaimed deposits from savings banks. Moreover, this court in *Security Savings Bank vs. State of California, supra*, referred to the *San Jose case* as authority for the proposition that a state could not take deposits in a national bank if unclaimed for twenty years. It seems to

us therefore that there is no basis for contending that the court in any way based its decision upon the rights of depositors, or that it proceeded on an erroneous theory in regard to rights of depositors.

Unquestionably there are respects in which national banks are subject to state legislation, but such legislation must be of such a character that it does not conflict with the general object and purpose of Congressional legislation. A national bank is subject to the reasonable exercise of the police power of a state. A probate court of a state can adjudicate the title to a deposit owned by a decedent. Such a deposit is subject to garnishment in a state court in a suit against the depositor.

In like manner, a national bank may be required to advance the amount of taxes levied by a state against the stockholders on their shares in the bank (*National Bank vs. Commonwealth*, 76 U. S. (9 Wall.) 353). A tax on the use of safety deposit vaults, which tax is on the customer, may be collected from the bank (*Colorado National Bank of Denver vs. Bedford*, 310 U. S. 41). A national bank may be required to furnish to public officials in a state a list of its shareholders and the number of their shares (*Waite vs. Dowley*, 94 U. S. 527). So also, a statute forbidding the giving of a preference by the transfer of property in the case of insolvency of the transferor has been held applicable to a transfer of property to a national bank (*McClellan vs. Chipman*, 164 U. S. 347).

These are illustrations of the principle that there are respects in which national banks and their operations may properly be subjected to the impact of state laws. But the impact is remote and insubstantial; it does not strike at the roots. The impact of the statute here in issue is quite different; it is aimed at and reaches the fundamental contract rights which serve as the foundation upon which the

business of banking ultimately rests, and so pervasive an attack cannot be regarded as other than in opposition to plain Congressional intent, at least until Congress otherwise declares. It is no answer to say that the difference is one of degree only; as this court has many times pointed out, there are "fields of the law where differences in degree produce ultimate differences in kind" and this is one of them; "drawing the line" in such a field is a "recurrent difficulty." See *Harrison vs. Schaffner*, 312 U. S. 579, 583.

The instant case falls into that category of which *Easton vs. Ioca*, 188 U. S. 220, cited by the court in the *San Jose* case is an example. In that case the plaintiff in error, the president of a national bank, was tried and found guilty of violating an Iowa statute prohibiting an officer of a bank from receiving a deposit knowing that the bank was insolvent. Sentence had been imposed under the criminal penalty provision of the Iowa statute. The Federal statutes imposed no penalty for fraudulently receiving deposits. This court, however, pointing out the provisions of law relating to national banks stated:

"It thus appears that Congress has provided a symmetrical and complete scheme for the banks to be organized under the provisions of the statute" (p. 231).

In answer to the claim that the Iowa statute benefited national banks by requiring a higher degree of diligence on the part of their officers, the court said:

"But we are unable to perceive that Congress intended to leave the field open for the states to attempt to promote the welfare and stability of national banks by direct legislation. If they had such power it would have to be exercised and limited by their own discretion, and confusion would necessarily result from control possessed and exercised by two independent authorities" (pp. 231, 232).

The court concluded:

"Our conclusions, upon principle and authority, are

that Congress, having power to create a system of national banks, is the judge as to the extent of the powers which should be conferred upon such banks; and has the sole power to regulate and control the exercise of their operations; that Congress has directly dealt with the subject of insolvency of such banks by giving control to the Secretary of the Treasury and the Comptroller of the Currency, who are authorized to suspend the operations of the banks and appoint receivers thereof when they become insolvent, or when they fail to make good any impairment of capital; *that full and adequate provisions have been made for the protection of creditors of such institutions by requiring frequent reports to be made of their condition; and by the power of visitation by Federal officers; that it is not competent for state legislatures to interfere, whether with hostile or friendly intentions, with national banks or their officers in the exercise of the powers bestowed upon them by the general government.*" (Italics ours.) (p. 238.)

In the instant case, Congress having provided that a national bank may receive deposits, can it be assumed that Congress intended to leave to the states the determination of the manner in which the banks shall dispose of those deposits? Is it consistent with the objects and purposes of Congressional legislation to give to the states the power to say when the nationally given right to accept deposits shall end? It is submitted that the court in the *San Jose case* properly held that Congress did not intend to permit the application to national banks of legislation such as the state act there in question; that the act was in conflict with the objects and purposes of Congressional legislation; and that the same and additional considerations today compel adherence to the principle of that case.

Point III.

The Protection of Depositors of National Banks Is a Subject Upon Which Congress Has Legislated and It Is Not a Proper Subject for State Legislation.

The Court of Appeals of Kentucky held that the Kentucky Act was intended for the protection of depositors. We do not concede that such is its purpose. Appellant contends that the act affords the depositor no protection, and as we have pointed out, the act in fact subjects him to inconvenience, expense and serious risk of loss. Nevertheless, since the Court of Appeals of Kentucky in the decision below held that the act was enacted for the benefit of depositors, it is proper to consider whether Kentucky can legislate for the protection of depositors in a national bank. The Kentucky court said:

"The good faith of the Legislature cannot be questioned and it is to be assumed that the Act was for the protection of the depositors as well as for the benefit of the state. That this is a justifiable assumption is clearly revealed in the provision giving the depositor (and this, of course, includes his legal representatives) the right, without limit of time, to make a claim and receive a return of the deposit provided there has not been a judicial determination of actual abandonment—and even after such judicial determination five years is given for the same purpose to any person who was not actually served with notice and did not appear in the proceedings." (170 S. W. (2d) 350, 352.)

It is our contention that protection of depositors of national banks has been provided through the operation of the laws of the United States, to which we shall refer, and that the State of Kentucky is therefore not permitted to legislate on this subject, and that, moreover, the Kentucky statutes here in question are in conflict with the general plan and operation of the laws of the United States.

This court has given explicit recognition to the fact that Federal legislation has provided a complete banking system and that the laws relating thereto are designed for the protection of depositors.

In *Deitrick vs. Greaney*, 309 U. S. 190, the court said :

"The National Bank Act constitutes 'by itself a complete system for the establishment and government of National Banks.' *Cook County Nat. Bank vs. United States*, 107 U. S. 445, 448, 27 L. ed. 537, 538, 2 S. Ct. 561. In addition to the sections of the Act conferring on national banking associations the authority to conduct a public banking business the Act contains numerous provisions designed for the protection of the bank's depositors and other creditors. It establishes minimum requirements for the amount of capital with which a bank may begin business, *Rev. Stats.*, §5138, 12 U. S. C. A., §51, and makes special provisions for securing the payment into the bank of the authorized capital, *Rev. Stats.*, §§5140, 5141, 12 U. S. C. A., §§53, 54. It prohibits the purchase by a bank of its own shares of stock and their retention when purchased, *Rev. Stats.*, §5201, 12 U. S. C. A., §83. Impairment of capital of an association through its withdrawal by payment of dividends or otherwise is prohibited. *Rev. Stats.*, §5204, 12 U. S. C. A., §56. Any bank whose capital has become impaired is required under direction of the Comptroller to make up the deficiency by assessment of its shareholders and in the event of its failure to do so a receiver may be appointed to wind up its business. *Rev. Stats.*, §5205, 12 U. S. C. A., §55.

"To insure performance of these duties and as a safeguard to creditors and the public, violation of the provisions of the Act by any director or officer of the bank or by any person aiding or abetting him, is made a criminal offense, *Rev. Stats.*, §5209, 12 U. S. C. A., §592, and in the event of such a violation, the association may be required to forfeit all its rights and privileges, *Rev. Stats.*, §5239, 12 U. S. C. A., §93. Further, by *Rev. Stats.*, §5240, 12 U. S. C. A., §§481, 484, the Comptroller of the Currency is required to appoint examiners who shall examine the affairs of every bank at least twice in

each calendar year with power to administer oaths and examine officers and agents of the bank under oath and who 'shall make a full and detailed report' of the bank to him. By *Rev. Stats.*, §5211, 12 U. S. C. A., §161, every association is required to make the Comptroller of the Currency not less than three reports each year exhibiting in detail and under appropriate heads the resources and liabilities of the association, and the Comptroller is given power to call for special reports whenever, in his judgment, the same are necessary in order to obtain a full and complete knowledge of the condition of the reporting bank." (Italics ours.)

In addition to the details of the comprehensive legislative plan referred to by the court, Congress has created Federal Deposit Insurance Corporation (Act of August 23, 1935, c. 614, 49 Stat. 684, 12 U. S. C., §264). Federal Deposit Insurance Corporation insures all deposits in all national banks within the United States up to a limit of \$5,000 for each depositor. This insurance is mandatory for national banks and the Act permits state banks to become members of Federal Deposit Insurance Corporation and eligible to insurance upon certain terms.

In view of the comprehensive Federal legislation which the court characterizes a "complete system for the establishment and government of national banks" and the specific provisions of Federal laws providing protection for the depositors of national banks, is the field now open to state legislation such as the Kentucky statute in question in this case?

The Kentucky statute is said to be for the protection of depositors—in other words, the state of Kentucky is undertaking to protect the depositors from loss. But that is also the purpose of Federal legislation in providing for periodic examination of banks, the furnishing of reports to the Comptroller of Currency, the prohibition against the purchase by a bank of its own shares, the impairment of the capital

of the bank and in the creation of the Federal Deposit Insurance Corporation, which relates specifically to deposits and provides insurance which is payable directly to depositors. All of these are protective measures intended to protect depositors and to insure the stability of national banks.

A bank cannot exist and carry on banking operations without deposits. Therefore, in protecting these deposits Congress is also providing for the continued existence of national banks. In spite of these provisions for the protection of national banks and their deposits the state of Kentucky is in effect saying to the depositors of appellant and other national banks in Kentucky, "This state will protect your deposits and its plan of protection is to take the deposits from the banks if you do not claim them in ten years." It should be noted that the state does not undertake to find the depositor so that he himself may claim his property, but it merely proposes to take the deposit.

We have, therefore, two conflicting methods of protection: One is the method proposed by Congress of making the bank a safe depository so that it will attract depositors since a large amount of deposits is needed to carry on successfully the operation of its business; the other, the method of the state of Kentucky, is to take the deposits away from the bank and let the depositor recover them from the state if he is willing to incur the expense and inconvenience necessary to do so. Are these two types of protection conflicting? To ask the question is to answer it. The two methods are utterly and completely in conflict,—one resulting in taking deposits from a bank, and the other in attracting them to a bank.

It is inconceivable that Congress having undertaken by numerous legislative acts to provide protection for the depositors of national banks intended to leave the field open to such state legislation, the effect of which is in a substan-

tial measure to take away from the banks the benefit conferred upon them by the operation of the Federal laws. The conclusion of this argument may be stated by paraphrasing the closing paragraph of the opinion in *Easton vs. Iowa*, *supra*: Congress having directly dealt with the subject of protection for depositors in national banks and having provided insurance for those deposits, full and adequate provision has been made for the protection of such creditors; and it is not competent for state legislatures to interfere, regardless of their intention, with the operation of national banks in the exercise of the powers conferred upon them by Congress.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals of Kentucky should be reversed.

Respectfully submitted,

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APPENDIX

Kentucky Revised Statutes..

CHAPTER 393

ESCHEATS

393.010 (1605a; 1610) CONSTRUCTION OF CHAPTER.

(1) As used in this chapter, unless the context requires otherwise:

(a) "Claim" means to demand payment or surrender of property from the person whose duty it is to pay the claimant, or surrender to him the property involved;

(b) "Commissioner" means the Commissioner of Revenue;

(c) "Department" means the Department of Revenue; and

(d) "Person" means any individual, state or national bank, partnership, joint stock company, business, trust, association, corporation, or other form of business, enterprise, including a receiver, trustee or liquidating agent.

(2) This chapter does not apply to bonds of counties, cities, school districts or other tax-levying subdivisions of this state.

393.020 (1606) PROPERTY SUBJECT TO ESCHEAT.

If any property having a situs in this state has been devised or bequeathed to any person and is not claimed by that person or by his heirs, distributees or devisees within eight years after the death of the testator, or if the owner of any property having a situs in this state dies without heirs or distributees entitled to it and without disposing of it by will, it shall vest in the state, subject to all legal and equitable demands. Also, any property abandoned by the owner, except a perfect title to a corporeal hereditament, shall vest in the state, subject to all legal and equitable demands. Any property that vests in the state under this section shall be liquidated, and the proceeds, less costs, fees and expenses incidental to all legal proceedings of the liquidation shall be paid to the department.

393.030 (1607) DISPOSITION OF PROPERTY SUBJECT TO ESCHATE.

(1) The personal representatives of a person, any part of whose property is not distributed by will, and who died without heirs or distributees entitled to it shall settle their accounts within one year after qualifying, and pay to the department the proceeds of all personal property, first deducting the proper legal liabilities of the estate.

(2) If the whole personal property cannot be settled and the accounts closed within one year, the settlement as far as practicable, shall then be made and the proceeds paid to the department, and the residue shall be settled and paid as soon thereafter as can be properly done.

(3) The personal representative shall take possession of the real property of the decedent not disposed of by his will, and rent it out from year to year until it is otherwise legally disposed of, and pay the net proceeds to the department.

(4) The personal representative shall also make out and transmit to the department a description of the quantity, quality, and estimate value of the real property and its probable annual profits.

393.040 (1608) PROCEDURE IF LEGACY OR DEVISE IS NOT CLAIMED.

If any devisee or legatee, or his heir, devisee or distributee, has failed for eight years to claim his legacy or devise, the personal representative of the testator, or other person possessing it shall, after deducting the legal liabilities thereon, pay and deliver it, and the net profits from it to the department.

393.050 (1609) PRESUMPTION OF DEATH AFTER SEVEN YEARS; DISPOSITION OF PROPERTY.

When a person owning any property having a situs in this state is not known to be living for seven successive years, and neither he nor his heirs, devisees or distributees can be located or proved to have been living for seven successive years, he shall be presumed to have died without heirs, devisees or distributees, and his property shall be liquidated and the proceeds, less costs incident to the liqui-

dation and any legal proceedings, and the liabilities which have been properly claimed and approved against it, shall be paid to the department.

393.060 (1610) DEPOSITS IN BANK OR TRUST COMPANY PAYABLE ON DEMAND; WHEN PRESUMED ABANDONED.

Any deposit (legal, beneficial, equitable or otherwise) payable on demand in any bank or trust company in this state, together with the interest thereon shall be presumed abandoned unless the owner has, within ten successive years next preceding the date as of which reports are required by KRS 393.110:

- (1) Negotiated in writing with the bank or trust company concerning it;
- (2) Been credited with interest on the passbook or certificate of deposit on his request;
- (3) Had a transfer, disposition of interest or other transaction noted of record in the books or records of the bank or trust company; or
- (4) Increased or decreased the amount of the deposit.

393.070 (1610) DEPOSITS NOT PAYABLE ON DEMAND; WHEN PRESUMED ABANDONED.

Any deposit (legal, beneficial, equitable or otherwise) other than those payable on demand in any bank or trust company in this state, together with the interest thereon, shall be presumed abandoned unless the owner has, within twenty-five successive years next preceding the date as of which reports are required by KRS 393.110:

- (1) Negotiated in writing with the bank or trust company concerning it;
- (2) Been credited with interest on the passbook or certificate of deposit on his request;
- (3) Had a transfer, disposition of interest or other transaction noted of record in the books or records of the bank or trust company; or
- (4) Increased or decreased the amount of the deposit.

393.080 (1610) DEPOSITS FOR SECURITY; WHEN PRESUMED ABANDONED.

Any deposit of money, stocks, bonds or other credits made to secure payment for services rendered or to be rendered, or to guarantee the performance of services or duties, or to protect against damage or harm, and the increments thereof, shall be presumed abandoned unless claimed by the person entitled thereto within ten years after the occurrence of the event that would obligate the holder or depository to return it or its equivalent.

393.090 (1610) INTANGIBLE PERSONAL PROPERTY HELD FOR ANOTHER; BENEFITS ON ANY INSTRUMENT; WHEN PRESUMED ABANDONED.

All dividends, stocks, bonds, money, credits and claims for money and credits, and all intangible personal property, and the increments of any of them, held in this state by any person for the benefit of another shall be presumed abandoned unless claimed by the beneficiary or person entitled thereto within ten years from the time the holder, trustee, debtor, or other responsible person became obligated to return them or their equivalent to the proper owner or claimant. If the increments or benefits payable on any instrument are not claimed within the time prescribed in this section, the instrument or evidence of the debt or obligation shall likewise be presumed abandoned.

393.100 (1610) PROPERTY PAID INTO COURT; WHEN PRESUMED ABANDONED.

Any property paid into any court of this state for distribution, and the increments thereof, shall be presumed abandoned if not claimed within five years after the date of payment into court, or as soon after the five-year period as all claims filed in connection with it have been disallowed or settled by the court.

393.110 (1611) HOLDERS OF ABANDONED PROPERTY TO REPORT TO DEPARTMENT; POSTING OF NOTICES; DUTY TO SURRENDER PROPERTY TO DEPARTMENT; RIGHTS OF ACTION.

(1) It shall be the duty of all state and National banks, trust companies, or other persons, and courts of this Commonwealth or the agents thereof, whether holding estates or property as bailee, depository, debtor, trustee, executor, liquidator, administrator, distributor, receiver, or in any other capacity coming within the purview of KRS 393.060 to 393.100, to report annually to the department as of July 1, all property held by them declared by this chapter to be presumed abandoned. The report shall be filed in the offices of the department on or before September 1 of each year for the preceding July 1, and shall give the name of the owner, his last known address, the amount and kind of property, and such other information as the department may require for the administration of this chapter. The report shall be made in duplicate; the original shall be retained by the department, and the copy shall be mailed to the sheriff of the county where the property is located or held. It shall be the duty of the sheriff to post said copy on the courthouse door or the courthouse bulletin board. The sheriff shall immediately certify in writing to the department the date when said copy was posted. Said copy must be posted on or before October 1 of the year when it is made, and shall be constructive notice to all interested parties and shall be in addition to any other notice provided by statute or existing as a matter of law.

(2) Any person who has made a report of any estate or property presumed abandoned, as required by this chapter, shall, between November 1 and November 15 of each year, turn over to the department all property so reported; but if the person making the report or the owner of the property shall certify to the department by sworn statement that any or all of the statutory conditions necessary to create a presumption of abandonment no longer exist or never did exist, or shall certify the existence of any fact or circumstance which has a substantial tendency to rebut such presumption, then, the person reporting or holding the property shall not be required to turn the property over to

the department except on order of court. No person shall be required to surrender any property on a presumption of abandonment to the department if the period of time provided by any statute of limitation applicable to the owner's rights as against the holder has expired unless the court orders him to do so. If a person files an action in court claiming any property which has been reported under the provisions of this chapter, the person reporting or holding such property shall be under no duty while any such action is pending to turn the property over to the department, but shall have the duty of notifying the department of the pendency of such action.

(3) The person reporting or holding the property or any claimant thereof shall always have the right to a judicial determination of his rights under this chapter and nothing therein shall be construed otherwise; and the Commonwealth may institute an action to recover such property as is presumed abandoned whether it has been reported or not and may include in one petition all such property within the jurisdiction of the court in which the action is brought provided the property of different persons is set out in separate paragraphs (1942, c. 156, §§1, 2).

393.120 (1612) SALE OF ABANDONED PROPERTY.

Any intangible personal property required by KRS 393.060 to 393.110 to be liquidated so as to permit payment to the department, shall be surrendered to the department and sold by it to the highest bidder at public sale at Frankfort, or in whatever city in the state affords, in its judgment, the most favorable market for the particular property involved. The department may decline the highest bid and reoffer the property for sale if it considers the price offered insufficient. The sale shall be advertised at least one week in advance in a newspaper of general bona fide circulation in the county where the property was found or abandoned, and in the county where the sale is to be made. The sale shall be held at the courthouse door.

393.130 (1613) TRANSFEROR TO DEPARTMENT RELIEVED OF LIABILITY.

Any person who transfers to the department property to which the state is entitled under this chapter shall be relieved of any liability to the owner arising from that transfer. The state shall reimburse any person who cannot be relieved of such liability by this section for all liability to the owner of the property or estate or damage incurred by reason of compliance with this chapter.

393.140 (1614) CLAIM OF INTEREST IN PROPERTY SURRENDERED TO STATE.

(1) Any person claiming an interest in any property paid or surrendered to the state in accordance with KRS 393.020 to 393.050 who was not actually served with notice, and who did not appear, and whose claim was not considered during the action or at the proceedings that resulted in its payment to the state, may, within five years after the judgment, file his claim to it with the department.

(2) Any person claiming an interest in any estate or property paid or surrendered to the state in accordance with KRS 393.060 to 393.120, that was not subsequently adjudged under the procedure set out in KRS 393.230 to have been actually abandoned, or owned by a decedent who had no heir, distributee, devisee or other person entitled under the laws of this state relating to wills, descent and distribution to take the legal or equitable title, may file his claim to it at any time after it was paid to this state.

(3) The claimant shall, within fifteen days after filing any claim permitted under this section, publish notice of the claim in a newspaper of general bona fide circulation in the county in which the property was held before being transferred to the state. If there is no such newspaper, the claimant shall post the notice at the courthouse door and in three other conspicuous places in that county, and shall file proof of publication or posted notice with the department. No such claim shall be allowed until fifteen days after proof of the notice is received by the department at its offices at Frankfort.

"Bona fide circulation" defined, KRS 424.010.

393.150 (1615) COMMISSIONER TO DETERMINE CLAIMS.

The commissioner shall consider any claim or defense permitted to be filed before the department and hear evidence concerning it. If the claimant establishes his claim, the commissioner shall, when the time for appeal or further legal procedure has expired, authorize payment to him of a sum equal to the amount paid into the State Treasury in compliance with this chapter. The decision shall be in writing and shall state the substance of the evidence heard by the commissioner, if a transcript is not kept. The decision shall be a matter of public record.

393.160 (1615) APPEALS FROM DECISION OF COMMISSIONER.

Any person dissatisfied with the decision of the commissioner may, within sixty days, appeal from it to the Franklin circuit court or file an action in that court to vacate the decision. In either event the proceedings shall be de novo, and no transcript of the record before the commissioner shall be required to be kept unless requested by the claimant. In such proceeding the commissioner shall be made a party defendant, and all other persons required by law to be made parties in actions in rem or quasi in rem shall be made parties. Any party adversely affected by the decision of the Franklin circuit court may appeal to the Court of Appeals within sixty days after the judgment. Upon an appeal the state shall not be required to make a supersedeas bond. The provisions of this section relating to the decision of the commissioner and appeals therefrom shall also apply to a decision of the commissioner rendered under authority of KRS 393.110.

393.170 (1616) PROPERTY IN FEDERAL CUSTODY: DETERMINATION OF WHETHER ESCHEAT HAS OCCURRED.

Whenever any property escheated under this chapter by reason of actual abandonment, or death or presumption of death of the owner without leaving any person entitled to take the legal or equitable title under the laws of this

state relating to wills, or descent and distribution, has been deposited with, or in the custody or under the control of, any Federal court in and for any district in this state, or in the custody of any depository, clerk or other officer of such court, or has been surrendered by such court or its officers to the United States Treasury, the circuit court of any county in which such Federal court sits shall have jurisdiction to ascertain whether an escheat has occurred, and to enter a judgment of escheat in favor of the state. This section does not authorize a judgment to require such courts, officers, agents or depositories to pay or surrender funds to this state on a presumption of abandonment as provided in KRS 393.060 to 393.110.

393.180 (1618) PROCEEDINGS INSTITUTED BY COUNTY ATTORNEY ON RELATION OF COMMISSIONER.

Any legal proceeding to enforce KRS 393.020 to 393.050 and to recover any sum due the state thereunder shall be instituted, on the relation of the commissioner, by the county attorney of the county in which any such property is located. The petition and all necessary pleadings shall be sent to the commissioner for his signature and approval. The petition shall be accompanied by an affidavit of the county attorney, stating the facts on which it is based. For all other pleadings, there shall be a statement by the county attorney of the reason for the particular pleading.

393.190 (1618) ASSISTANT ATTORNEY-GENERAL TO AID COUNTY ATTORNEY.

On any action filed by a county attorney under the provisions of this chapter, the assistant Attorney-General provided for in KRS 15.140 shall offer assistance and suggestions to the county attorney in the preparation of the petition or any pleadings, and revise and correct them as he considers necessary, subject to the ultimate approval of the commissioner, when he is required to sign them.

393.200 (1618) COMPENSATION OF COUNTY ATTORNEY; COMMISSIONER MAY PERFORM HIS DUTIES.

If the county attorney performs all the duties imposed upon him by this chapter relating to enforcement of KRS 393.020 to 393.050 he shall be entitled to a fee of fifteen percent of any sum recovered in the proceeding, but shall be limited to five percent on intangible property recovered in excess of one thousand dollars. If the county attorney declines to perform the duties imposed upon him by this chapter, they may be performed by the commissioner, and the county attorney shall not be entitled to any fee. When he considers it to the best interest of the state, the commissioner may institute any action authorized by this chapter to be brought by the county attorney, or join the county attorney in the active prosecution of any such action. The county attorney shall be entitled to his fee in either instance if he does his duty.

Assistant Attorney-General assigned to Department of Revenue, KRS 15.140.

393.210 (1618) PROPERTY IN TWO OR MORE COUNTIES; COMPENSATION OF COUNTY ATTORNEYS.

If the property of a person coming within the purview of KRS 393.020 to 393.050 is located in two or more counties, all the property may be included in one action. The county attorneys of all counties in which such property is located may join in the prosecution of the proceeding. Their fees shall be determined by the amount of money derived from the property located within their respective counties when possible to determine that figure. Otherwise, the courts shall determine their fees by equitable apportionment in accordance with the value of the property located in their respective counties.

393.220 (1618) DISPOSITION OF TANGIBLE PROPERTY DURING PROCEEDING.

Pending the outcome of an action, the court may make such disposition of the land or tangible personal property involved as it considers best from the standpoints of use, rents, interest and profits. If the use of the property is

given to the claimant by the court, he shall be held accountable for returns and profits arising from it if the state is successful in the proceeding.

393.230 (1619) PROCEEDING TO FORCE PAYMENT OF INTANGIBLE PROPERTY; TO ESTABLISH ACTUAL ABANDONMENT.

(1) If any person or the agent of any court refuses to pay or surrender intangible property to the department as provided in KRS 393.060 to 393.110, an equitable proceeding may be brought on the relation of the commissioner to force payment or surrender. All property subject to KRS 393.060 to 393.110 may be listed and included in a single action.

(2) If any intangible property is turned over to the department on presumption of abandonment, in accordance with KRS 393.060 to 393.120, the commissioner may at any subsequent time institute proceedings to establish conclusively that it was actually abandoned, or that the owner has died and there is no person entitled to it.

393.240 (1619) ACTIONS MAY BE JOINED; SHALL BE IN EQUITY.

(1) If any person has property coming within the purview of KRS 393.020 to 393.050, and also of KRS 393.060 to 393.110, the actions required to be brought by the county attorney and the commissioner may be joined, but joinder is not required, and if separate actions are brought, they shall not be considered as coming within the rule against splitting a cause of action. The county attorney is not charged with the duty of enforcing sections KRS 393.060 to 393.120, 393.150 or 393.160.

(2) The procedure for all actions under this chapter shall be filed as equity actions and follow the procedure provided by the Civil Code of Practice, unless otherwise provided in this chapter.

393.250 (1620) EXPENSES, HOW PAID; COUNTY ATTORNEY TO COLLECT JUDGMENTS, DEDUCT FEE.

(1) Any necessary expense required to be paid by the state in administering and enforcing this chapter shall be paid out of appropriations made to the department.

(2) The county attorney shall act as agent of the department for the collection of all judgments recovered in actions prosecuted by him under this chapter. He shall deduct the fee allowed him and promptly remit the remainder to the department with such information relating thereto as the department requires.

393.260 (1621) LIMITATION OF STATE'S ACTION.

Any action brought by the state under this chapter shall be brought within fifteen years from June 12, 1940, or from the time when the cause of action accrued, whichever is the later date.

393.270 (1622) PERSON UNDER DISABILITY, EXTENSION.

Any person under disability affected by this chapter shall have five years after the disability is removed in which to take any action or procedure or make any defense allowed to one *sui juris*.

393.280 (1622-1) EXAMINATION OF RECORDS; PROMULGATION OF RULES; DELEGATION OF COMMISSIONER'S AUTHORITY.

(1) The department, through its employees, may examine all records of any person where there is reason to believe that there has been or is a failure to report property that should be reported under this chapter.

(2) The commissioner may promulgate any reasonable and necessary rules for the enforcement of this chapter, and govern hearings held before him. He may delegate in writing to any regular employee of the department authority to perform any of the duties imposed on him by this chapter, except the promulgation of rules.

393.290 (1622-1) CIVIL ACTION TO ENFORCE PRODUCTION OF REPORTS, SURRENDER OF PROPERTY.

(1) The department may require the production of reports, or the surrender of property as provided in this chapter by civil action, including an action in the nature of a bill of discovery, in which case the defendant shall pay a penalty equal to ten percent of all amounts that he is ultimately required to surrender. This penalty shall not exceed five hundred dollars.

(2) Any person who in good faith contests the applicability of this chapter to him may be relieved of the threat of any penalty by posting a compliance bond in an amount and of surety sufficient to the court.

393.300 (1623-1) RESTRICTION ON ESCHEAT OF REAL PROPERTY HELD BY LENDING CORPORATION UNDER SUPERVISION.

No person shall institute proceedings to escheat real property the title to which was acquired by any lending corporation in satisfaction of debts previously contracted in the course of its business, or that it purchases under a judgment for any such debt in its favor, if such lending corporation is under the supervision of the Division of Banking of this state, Comptroller of Currency of the United States or any other duly constituted supervising banking authority, state or Federal, without first obtaining the consent of the supervising authority having supervision over that corporation.

393.990 (1622-1) PENALTIES.

Any person who refuses to make any report as required by this chapter shall be fined not less than fifty dollars nor more than two hundred dollars, or imprisoned for not less than thirty days nor more than six months, or both.

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OF THE
United States

OCTOBER TERM, 1943

No. 154

ANDERSON NATIONAL BANK, Suing on
Behalf of Itself and All Others Simi-
larly Situated,

Appellants,

VS.

H. CLYDE REEVES, Individually and as
Commissioner of Revenue of the
State of Kentucky, etc., et al.,

Appellees.

Appeal from the Court of Appeals of the State of Kentucky.

BRIEF ON BEHALF OF CALIFORNIA BANKERS ASSOCIATION,
AMICUS CURIAE.

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In the Supreme Court

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**BRIEF ON BEHALF OF CALIFORNIA BANKERS ASSOCIATION,
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STATEMENT OF REASONS FOR THIS BRIEF.

California Bankers Association is a voluntary Association, its members being all the banks, both state and national, doing business in California. This Association has a particular interest in the case at bar for

several reasons: (1) The case of *First National Bank of San Jose v. State of California*, 262 U.S. 366, involved the application of the so-called "escheat statutes" of this State to national banks; (2) the application of that decision to similar statutes is involved in this case; (3) the Attorney General of California has filed a brief in which the correctness of the decision in *First National Bank of San Jose v. State of California* is attacked; and, finally, (4) the national banks of this State believe that the Kentucky statutes involved in the instant case constitute one more attempt on the part of the states to interfere with their business.

ARGUMENT.

We do not deem it necessary to review at length the Kentucky statutes involved—they are set out at length in the briefs of the several counsel.

We hope to point out, however, that there is no sound fundamental distinction between the statutes of California construed in *First National Bank of San Jose v. State of California*, 262 U.S. 366, and the statutes of Kentucky to be construed in the case at bar, insofar as their effect upon and application to national banks is concerned.

At the time this Court decided the case of *First National Bank of San Jose v. State of California* (decided June 4th, 1923), Sections 1272 and 1273 of the Code of Civil Procedure of this State read as appears in the attached Appendix. Section 15 of

the Bank Act of this State contained similar provisions (see attached Appendix).

The first case decided by our Courts construing these statutes after they were enacted is *Mathews, Administrator, v. Savings Union Bank etc. Company*, 43 Cal. App. 45, 184 Pac. 418 (decided August 26th, 1919). This was a decision by a District Court of Appeal but a hearing was denied by the Supreme Court of California. In that case the defendant (a State bank), on January 1st, 1917, had a large sum of money on deposit to the credit of one Anderson. Anderson had died in 1892 but this fact was not known to the bank; nothing had happened in the account for more than twenty-five (25) years. As required by the several statutes of California the bank had reported the account to the State Treasurer. In March, 1917, the plaintiff Mathews, the Public Administrator of the county where Anderson resided at the time of his death, was appointed administrator of his estate; he duly qualified and immediately thereafter made demand on the bank for the deposit to the credit of Anderson. The bank refused payment and Mathews, the administrator of the Anderson estate, brought action against the bank for the amount of the deposit. The State of California intervened in the action and set up the claim that because the demand of Mathews, the administrator of the Anderson estate, was not made until after January 1st, 1917 the account had escheated to the State. The trial Court so held and gave judgment for the State. In reversing the judgment the Appellate Court said:

“So obnoxious to the sense of justice is the suggestion that the state may take for its own use the property of one of its citizens, without compensation and without hearing, that, unless the language of a statute is express and unmistakable, courts will not attribute to the co-ordinate law-making body the purpose of invading the common right and violating those fundamental constitutional provisions by which the individual is protected against arbitrary action on the part of the government. The language of the statutes here in question requires no such interpretation.”

The second case which came before our Courts involving our escheat statutes is *State of California v. Savings Union Bank etc. Company*, 186 Cal. 294, 199 Pac. 26 (decided June 20th, 1921). This is a companion case to *Mathews v. Savings Union Bank etc. Company*, *supra*. While the case of *Mathews v. Savings Union Bank etc. Company* was pending (the State of California having intervened and set up its claim) the State brought a separate action against the defendant bank in the Superior Court of Sacramento County under the authority of these statutes to obtain a judgment declaring that the deposit to the credit of Anderson had escheated to the State. The trial Court gave judgment for the State and the bank appealed. The Court said:

“The precise claim of the state is that the declaration in section 1273 that the money which has remained on deposit twenty years under the conditions therein stated ‘shall, with the increase and proceeds thereof, escheat to the state,’ accomplishes an instantaneous escheat; that the only

purpose of the action therein provided for is to obtain an adjudication that the escheat had already occurred and an order for the transfer of the money from the bank to the state treasurer; that it is really for the protection of the bank against other claims to the money and is not in any sense for the benefit of the person who made the deposit or those claiming under him, and that neither the original owner nor his heirs, assigns, or personal representatives may claim the money by virtue of a demand made after the twenty years had run. The sole questions presented are whether or not the statutes so provide, and, if they do, whether or not they are invalid for the reason that in that event they provide for the taking of property without due process of law."

And, further, the Court said:

"In view of these rules of construction, and of the fact that the statute would be utterly void if given the meaning attributed to it by the attorney-general, we are of the opinion that the provision of section 1273 that bank deposits unclaimed for twenty years, as there stated, shall escheat to the state, must not be taken as intending to provide for an immediate escheat, but as providing that the same shall be taken over by the state as an escheat when so adjudged in the action so provided for. This is the effect of the decision in *Estate of Miner*, 143 Cal. 194 (76 Pac. 968), although in that case this particular statute was not considered, that case having been decided before its enactment. For these reasons, in addition to those given by the district court of appeal, we think the court erred in holding that the property had escheated to the state."

The Supreme Court therefore reversed the judgment of the trial Court.

The third case involving these statutes and decided by our Supreme Court is *State of California v. Security Savings Bank*, 186 Cal. 419, 199 Pac. 791 (decided July 5th, 1921), and affirmed by this Court in *Security Savings Bank v. State of California*, 263 U.S. 282, on November 19th, 1923. In this case the State of California brought an action against the bank (a State bank) under the provisions of the statutes of California (Sections 1272 and 1273, Code of Civil Procedure) to declare an escheat of certain deposits in the bank which had been unclaimed for twenty (20) years, and recovered judgment. The bank urged certain constitutional objections to the statutes which were overruled by the Supreme Court of this State and by the Supreme Court of the United States. In affirming the judgment, however, the Supreme Court of California said:

“Section 1272 of the Code of Civil Procedure allows ‘any person not a party or privy’ to ‘any proceeding had under this title’ to petition the court at any time within five years after final judgment in such proceeding for another judgment directing that the property declared in the previous judgment to have escheated to the state be delivered to him, or if it is money, that the amount be paid to him by the state, and be declared to be his own. The title referred to is title VIII, the subhead of which is ‘Escheated Estates,’ and it includes section 1272 and 1273. Although the language of section 1273, literally interpreted, would bar all persons whatever from

afterward claiming the property adjudged to have escheated, section 1272 indicates that it was not intended to be final except as to persons who were 'parties or privies' to the proceeding. As the process provided for in the proceeding under section 1273 purports to run to all the world, it may be difficult to give effect to the phrase 'party or privy,' as used in section 1272, unless it is confined to persons who appeared in the proceeding and those claiming under such persons. If it has this meaning, the judgment under section 1273 does not finally bar the depositors or others interested who did not appear, but merely sets the five-year period running against them. As we remarked at the outset, no persons appeared or appealed except the bank, and the rights of other persons cannot be adjudicated on this appeal. Consequently we express no opinion upon the question just stated. We mention it only to forestall the inference that we have decided it by implication."

What did the Supreme Court of this State mean by this statement? Simply this: Under Section 1272 of the Code of Civil Procedure any "person not a party or privy" to "any proceeding under this title" (the Code of Civil Procedure is divided into titles and Sections 1272 and 1273 are under the title of "Escheated Estates") may petition the Court at any time within five (5) years after final judgment in the escheat proceedings for another judgment directing that the property escheated to the State in the prior judgment be restored to him. The language of Section 1273 Code of Civil Procedure, literally inter-

preted, would bar *all persons* whatever from afterward claiming the escheated property, but Section 1272 indicates that the judgment was not intended to be final except as to persons who were "parties or privies" to the proceedings. Since the process under Section 1273 runs to all the world, it may be difficult to give effect to the phrase "party or privy" as used in Section 1272 unless "party or privy" means only those persons *named* and who *appeared* in the original proceedings and those claiming under them. If that is what is meant by the phrase "party or privy" as used in Section 1272, then the judgment under Section 1273 (the escheat judgment) does not finally bar the depositors and others interested who did not *appear* in the escheat proceedings, although *named* as parties therein, but only starts the five-year period. But, says the Court, no depositor appeared in the escheat proceedings (only the defendant bank), so no rights are adjudicated except the bank's rights. The rights of other defendants—the depositors whose deposits are taken over to the State by the judgment of escheat—are not determined. Our Supreme Court did not determine the final rights of those persons *named* in the escheat proceedings but who did not *appear* and defend their rights. The Court was speaking only about the rights of those depositors named in the escheat proceedings who did not appear and defend and whether they could ultimately recover from the State.

The fourth—and last—case passing upon these escheat statutes which came before the Supreme Court of California prior to the decision by this Court in

First National Bank of San José v. State of California is *State of California v. Anglo & London Paris National Bank of San Francisco, First National Bank of San Jose et al.*, 186 Cal. 746, 200 Pac. 612 (decided August 29th, 1921). This was an action by the State against several national banks doing business in California to recover certain deposits which had remained unclaimed in the several defendant banks for more than twenty (20) years. It will be observed that the Supreme Court of California had under consideration at the same time the case involving state banks and the case involving national banks. The State recovered judgment against the national banks involved. The Supreme Court of this State affirmed the judgment of the trial court in favor of the State against the national banks and this was the judgment reversed by the Supreme Court of the United States in *First National Bank of San José v. State of California*, 262 U.S. 366 (decided June 4th, 1923). We observe at this point that the case involving the national banks reached this Court and was decided (June 4th, 1923) before the case involving the state banks was decided by this Court (*Security Savings Bank v. State of California*, 263 U.S. 282, decided on November 19th, 1923). The Supreme Court of California, in affirming the judgment of the trial court against the national banks (*State of California v. Anglo & London Paris National Bank*) said:

"We deem it proper to repeat the statement at the conclusion of our decision in *State v. Security Sav. Bank*, ante, p. 419, 199 Pac. 791, that we ex-

press no opinion upon the question whether the judgment of the superior court herein operates as a present escheat of the rights of the several depositors against the respective banks, or whether under section 1272 they each still have the right within the time there stated to prosecute an action to obtain payment of their several deposits from the state treasurer, and to say that if they have such right the judgment of the superior court would not be a bar thereto."

When the case of *First National Bank of San Jose v. California*, 262 U.S. 366, was before this Court the Court had before it the following decisions of the California Courts:

Mathews v. Savings Union Bank etc. Company,
43 Cal. App. 45, 184 Pac. 418;

State of California v. Savings Union Bank etc. Company, 186 Cal. 294, 199 Pac. 26;

State of California v. Security Savings Bank,
186 Cal. 419, 199 Pac. 791;

State of California v. Anglo & London Paris National Bank of San Francisco, et al., 186 Cal. 746, 200 Pac. 612.

With these decisions before this Court the Court said, in *First National Bank of San Jose v. State of California*, that the Supreme Court of California had not determined whether the judgment of the superior court operated as a present escheat of the rights of the several depositors against the respective banks or whether, under Section 1272 of the Code of Civil Procedure, the depositors still had the right within the

time there stated (five (5) years after the judgment) to prosecute an action to obtain payment of their several deposits from the State Treasurer, and that if they had such right the judgment of the court was not a bar thereto. The exact language of this Court on this point is as follows:

“The Supreme Court declined to express an opinion upon the question whether the judgment of the superior court herein operates as a present escheat of the rights of the several depositors against the respective banks, or whether under section 1272 they each still have the right within the time there stated to prosecute an action to obtain payment of their several deposits from the state treasurer,” and said, “if they have such right the judgment of the superior court would not be a bar thereto’.”

What does this mean, in plain terms? Simply this: We do not know at this time and the California courts have not said whether the judgment in and of itself operates as an escheat, or whether the depositors (those named as defendants in the action) whose accounts have been taken over by the State may still pursue their right against the State Treasurer, if they did not *appear* in the action although *named* therein. That this is exactly what this Court meant is made clear by the following language of this Court in the case of *Security Savings Bank v. State of California*, 263 U.S. 282 (decided November 19th, 1923), at page 290:

"In the opinion below it was suggested that the statute may be construed as permitting a depositor, although named as defendant in the attorney general's suit, to make claim as against the State, under Section 1272, at any time within the five years (or the extended period) after final judgment, if he did not appear in the suit. As no depositor had appeared, the point was not passed upon; and the state court expressly left open the rights of depositors and their privies in respect to escheat. *State v. Security Savings Bank*, 186 Cal. 419, 431. We have no occasion to consider them."

This Court said (not in plain terms but necessarily following from the decision) that it did not make any difference what the California courts would eventually say on this point; it did not make any particular difference whether the depositors whose rights were affected by the judgment have or have not the right to recover their money from the State Treasurer within a certain period; under the statutes of California the State was given the right to "dissolve contracts of depositors in national banks" and that cannot be done by a State. What may happen after that time, and whether a depositor in a national bank, who was named in the proceedings to take over his deposit but who did not *appear and defend*, can later get his money back made no particular difference. There can be no question—and it was admitted—that the effect of the judgment was to take the money out of the national banks and turn it over to the State; the

"contracts of deposit were dissolved"; that, the Supreme Court of the United States said, could not be done, and struck down the statutes so far as national banks were concerned.

Had it been necessary for this Court, in order to reach a decision in *First National Bank of San Jose v. State of California*, to determine the rights of depositors to recover their money from the State Treasurer it would have done so, since the interpretation and effect of the laws of the United States was involved.

See

Larson v. South Dakota, etc., 278 U.S. 429;

Appleby v. New York, 271 U.S. 364.

But this Court plainly said, in the *First National Bank of San Jose* case, that irrespective of whether the depositors who were named as defendants in the escheat proceedings but who did not appear therein may or may not recover their money from the State, the fact is that the judgment of the court operating under the California statutes dissolves the contracts of deposit between the national bank and the depositors and requires the national bank to pay over the deposits to the State. That, says this Court, we will not permit.

We turn now to the decision of the Court of Appeals of Kentucky in *Anderson National Bank v. Reeves*, 293 Ky. 735, 170 S. W. (2d) 350. The Court said in that case that the decision in *First National*

Bank of San Jose v. State of California, 262 U. S. 366, did not apply, because:

"* * * in discussing the case, the Supreme Court treated the California statutes as statutes of escheat or confiscation and held them void as being a regulation of national banks to such an extent as to tend to frustrate the purposes and objects of national legislation with respect to such banks. * * * Thus it seems that the California statutes were held invalid as to national banks because they were deemed by the court to be *escheat* statutes confiscating the deposits solely by reason of *dormancy*. The comment of the court on the failure of the California court to express an opinion on the right of the depositor to secure a return of the deposit is significant. Thus, while this case unquestionably decided that the California statutes were invalid as to national banks, and while this decision was reaffirmed as to the particular California statutes in the later case of *Security Sav. Bank v. California*, *supra*, we do not feel that it is controlling as to the act in controversy since the Act differs from the California statutes in that no escheat is declared by reason of mere dormancy—the Act is one pursuant to which mere custody, as distinguished from title, is vested in the state by reason of dormancy and is not one of confiscation having the tendency to cause depositors to hesitate to make deposits in national banks. And, since the confiscatory feature, which the Supreme Court had in mind as being the feature of the California statutes which tended to bring about an undue interference with national banks, is absent from

the present Act, it does not appear to us that the case is controlling of the question now presented.

“Since the act in controversy does not provide for an escheat of deposits by reason of mere dormancy, as did the California statutes (title being vested in the state only after judicial determination of *actual* abandonment), and since the depositor may at any time before actual abandonment is adjudged (and five years thereafter if he was not served with actual notice) secure a return of his deposit from the state, it is our opinion that the Act has no tendency to cause depositors to hesitate on account of apprehended fear of confiscation to make deposits in national banks. This being true, there is no unwarranted interference with such banks and no frustration of the purposes of national legislation concerning them such as to render the Act invalid as to them.”

We urge that this is not a correct analysis of the holding of this Court in the *First National Bank of San Jose* case. This Court never said in the *First National Bank of San Jose* case that the California statutes were confiscatory; this Court never treated the California statutes in that case as confiscatory; this Court never had in mind in deciding the *First National Bank of San Jose* case that the California statutes were confiscatory. As we have heretofore pointed out in this brief, all this Court ever said on this point in the *First National Bank of San Jose* case was that the particular circumstances under which the depositor may recover his money from the State after

the State took the money, and the conditions under which he may recover it had not been determined by the Supreme Court of California, and that this Court did not determine that question. This Court, in the *First National Bank of San Jose* case, found that the California escheat statutes dissolved the contracts of deposit between a national bank and its depositors and that such dissolution was void. If the Kentucky statutes do not do the ~~v~~ same thing—if they do not dissolve the contracts of deposit between a national bank and its depositors—then they do nothing. Certainly under the Kentucky statutes the State takes over deposits from national banks; certainly it dissolves the contracts of deposit which this Court said, in the *First National Bank of San Jose* case, could not be ~~done~~. It is of no consequence whether the depositors may recover these accounts from the State of Kentucky; it was of no consequence in the *First National Bank of San Jose* case. Under the Kentucky statutes perhaps the depositor may recover his money from the State; under the California statutes perhaps the depositor may recover his money from the State; that makes no difference. This Court held, in the *First National Bank of San Jose* case, that the California statutes constituted an unlawful interference with the business of national banks and, likewise, the Kentucky statutes constitute an unlawful interference with the business of national banks. The distinction which the Court of Appeals of Kentucky makes between the California statutes and the Kentucky statutes is a "distinction without a difference".

The Attorney General of California in his brief argues that *First National Bank of San José v. State of California* should be "reviewed" and reversed; and a considerable portion of his brief is to the effect that the decision in that case is incorrect. We point out that this case has been cited with approval and affirmed by this Court in numerous later decisions.

See:

Security Savings Bank v. State of California,
263 U. S. 282 (at p. 284);

First National Bank v. State of Missouri, 263
U. S. 640 (at p. 664);

National City Bank v. Philippine Islands, 302
U. S. 651;

Colorado National Bank of Denver v. Bedford,
310 U. S. 41 (at p. 50).

It has also been followed by many State and Federal Courts.

In the brief of the Attorney General of California he argues that a receiver of a corporation appointed by a state court may withdraw moneys of the corporation on deposit in a national bank and that such withdrawal does not interfere with the governmental functions of the bank. Certainly this may be done, because the receiver succeeds to all the rights of the corporation of which he is appointed receiver and he is entitled to all its assets. The corporation-depositor had the right to withdraw moneys from its account and the receiver succeeds to all the rights of the depositor. An executor or administrator of a deceased

depositor appointed by a state court may likewise withdraw the moneys on deposit to the credit of a deceased depositor in a national bank for the same reason.

The Attorney General further argues that a sheriff armed with a garnishment issued by a state court may garnish the moneys of a depositor in a national bank and that such an act is not interfering with the bank's governmental functions. Here, again, the sheriff is doing exactly what the depositor could do; the sheriff, in such a case, "stands in the shoes" of the depositor and exercises his rights. It has been held that a garnishment does not interfere with the functions of a national bank.

Earle v. Pennsylvania, 178 U. S. 449;

Earle v. Conway, 178 U. S. 456.

The same rule applies to other agencies of the Federal government.

Federal Housing Administrator v. Burr, 309 U. S. 242.

The National Banking Act contains a provision similar to that of the Federal Housing Administration Act permitting a national bank "to sue and be sued" (U. S. Code, Title 12, Section 24), but property belonging to a national bank may not be attached by process in a state court (U. S. Code, Title 12, Section 91).

CONCLUSION.

We respectfully submit that the case of *First National Bank of San Jose v. State of California* is controlling in the case at bar and that the judgment of the Kentucky Court of Appeals should be reversed.

Dated, San Francisco,

January 12, 1944.

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(Appendix Follows.)

Appendix

Section 1272 Code of Civil Procedure.

Claim to escheated property: Limitation: Petition, filing and what must be shown: Service, answer and trial of issues: Judgment: Failure to appear, etc., within time limit, effect. Within five years after judgment in any proceeding had under this title, a person not a party or privy to such proceeding may file a petition in the superior court of the county of Sacramento, showing his claim or right to the property, or the proceeds thereof.

What petition must show. Said petition shall be verified, and, among other things must state:

The full name, and the place and date of birth of the decedent whose estate, or any part thereof, is claimed.

The full name of such decedent's father and the maiden name of his mother, the places and dates of their respective births, the place and date of their marriage, the full names of all children and the issue of such marriage, with the date of birth of each, and the place and date of death of all children of such marriage who have died unmarried and without issue.

Whether or not such decedent was ever married, and if so, where, when and to whom.

How, when and where such marriage, if any, was dissolved.

Whether or not said decedent was ever remarried, and, if so, where, when and to whom.

The full names, and the dates and places of birth of all lineal descendants, if any, of said decedent; the dates and places of death of any thereof who died prior to the filing of such petition; and the places of residence of all who are then surviving, with the degree of relationship of each of such survivors to said decedent.

Whether any of the brothers or sisters of such decedent ever married, and, if so, where, when and whom.

The full names, and the places and dates of birth of all children the issue of the marriage of any such brother or sister of decedent, and the date and place of death of all deceased nephews and nieces of said decedent.

Whether or not said decedent, if of foreign birth, ever became a naturalized citizen of the United States, and if so, when, where, and by what court citizenship was conferred.

The post-office names of the cities, towns or other places, each in its appropriate connection, wherein are preserved the records of the births, marriages and deaths hereinbefore enumerated, and, if known, the title of the public official or other person having custody of such records.

If for any reason, the petitioner is unable to set forth any of the matters or things hereinabove re-

quired, he shall clearly state such reason in his petition.

Service: Answer. A copy of such petition must be served on the attorney general at least twenty days before the hearing of the petition, who must answer the same.

Trial of issues: Judgment. And the court thereupon must try the issue as issues are tried in civil actions, and if it is determined that such person is entitled to the property, or the proceeds thereof, it must order the property, if it has not been sold, to be delivered to him, or if it has been sold and the proceeds paid into the state treasury, then it must order the controller to draw his warrant on the treasury for the payment of the same, but without interest or cost to the state, a copy of which order, under the seal of the court, shall be a sufficient voucher for drawing such warrant.

Failure to appear etc., within time limit, effect. All persons who fail to appear and file their petitions within the time limited are forever barred; saving, however, to infants, and persons of unsound mind, the right to appear and file their petitions at any time within the time limited, or within one year after their respective disabilities cease.

Statutes of California 1915, Chapter 555, page 934.

Section 1273, Code of Civil Procedure.

Unclaimed bank deposits: Escheat to state: Action by attorney-general: Service of process: Trial and judgment. All amounts of money heretofore or hereafter deposited with any bank to the credit of depositors who have not made a deposit on said account or withdrawn any part thereof or the interest, and which shall have remained unclaimed for more than twenty years after the date of such deposit, or withdrawal of any part of principal or interest, and where neither the depositor nor any claimant has filed any notice with such bank showing his or her present residence, shall, with the increase and proceeds thereof, escheat to the state.

Action commenced. Whenever the attorney-general shall be informed of such deposits, he shall commence an action or actions in the name of the State of California, in the superior court for the county of Sacramento, in which shall be joined as parties the bank or banks in which the moneys are deposited and the names of all such depositors. All or any number of depositors or banks may be included in one action.

Service of process. Service of process in such action or actions shall be made by delivery of a copy of the complaint and summons to the president, cashier or managing officer of each defendant bank, and by publication of a copy of such summons in a newspaper of general circulation published in said county for a period of four weeks.

Upon the trial the court must hear all parties who have appeared therein and if it be determined that the moneys deposited in any defendant bank or banks are unclaimed as hereinabove stated, then the court must render judgment in favor of the state declaring that said moneys have escheated to the state and commanding said bank or banks to forthwith deposit all such moneys with the state treasurer, to be received, invested, accounted for and paid out in the same manner and by the same officers as is provided in the case of other escheated property.

Statutes of California 1915, Chapter 84, page 107.

Section 15, Bank Act.

Sec. 15. All amounts of money heretofore or hereafter deposited with any bank to the credit of depositors who have not made a deposit on said account or withdrawn any part thereof or the interest and which shall have remained unclaimed for more than twenty years after the date of such deposit, or withdrawal of any part of principal or interest, and where neither the depositor or any claimant has filed any notice with such bank showing his or her present residence, shall, with the increase and proceeds thereof, be deposited with the state treasurer after judgment in the manner provided in the Code of Civil Procedure. At the time of issuing the summons in the action provided for in section 1273 of the Code of Civil Procedure, the clerk shall also issue a notice

signed by him giving the title and number of said action, and referring to the complaint therein, and directed to all persons, other than those named as defendants therein, claiming any interest in any deposit mentioned in said complaint, and requiring them to appear within sixty days after the first publication of such summons, and show cause, if any they have, why the moneys involved in said action should not be deposited with the state treasurer as in said section provided, and notifying them that if they do not so appear and show cause, the state will apply to the court for the relief demanded in the complaint. A copy of said notice shall be attached to and published with the copy of said summons required to be published by said section, and at the end of the copy of such notice so published there shall be a statement of the date of the first publication of said summons and notice. Any person interested may appear in said action and become a party thereto. Upon the completion of the publication of the summons and notice, and the service of the summons on the defendant bank, or banks, as in said section 1273 of the Code of Civil Procedure provided, the court shall have full and complete jurisdiction over the state, and the said deposits and of the person of everyone having or claiming any interest in the said deposits, or any of them, and shall have full and complete jurisdiction to hear and determine the issues therein, and render the appropriate judgment thereon. The president or managing officer of every bank must, within fifteen days after the first day of January of every year,

return to the superintendent of banks and to the state controller a sworn statement showing the names of depositors known to be dead, or who have not made further deposits, or withdrawn any moneys during the preceding twenty years. Such statement shall show in detail the following matters, viz.:

First—The name and last known place of residence or post office address of the person making such deposit;

Second—The amount and date of such deposit and whether the same are in moneys or securities, and if the latter, the nature of the same;

Third—The interest due on such deposit, if any, and the amount thereof;

Fourth—The sum total of such deposit, together with the interest added thereto due from such bank on account of such deposit or deposits and the interest thereon to such depositor, but nothing contained herein shall require any corporation or person renting lock boxes or safes in vaults for storage purposes to open or report concerning property stored therein. Such reports itemized as aforesaid shall be signed by the person making the same and shall be sworn to before a person competent to administer oaths as a full, complete and truthful statement of each of the items therein contained.

The president or managing officer of every bank must, within fifteen days after the first day of January of every odd numbered year, return to the super-

intendent of banks a sworn statement showing the names of depositors known to be dead, or who have not made further deposits, or withdrawn any moneys during the preceding ten years. Such statements shall show the amount of the account, the depositor's last known place of residence or post office address, and the fact of death, if known to such president or managing officer. Such president or managing officer must give notice of these deposits in one or more newspapers published in or nearest to the town or city where such bank has its principal place of business, at least once a week for four consecutive weeks, the cost of such publication to be paid pro rata out of such unclaimed deposits. This section does not apply to any deposit made by or in the name of a person known to the president or managing officer to be living. The superintendent of banks must incorporate in his subsequent report such returns made to him as provided in this section. If any president or managing officer of any bank neglects or refuses to make the sworn statements required by this section such bank shall forfeit to the State of California the sum of one hundred dollars a day for each day such default shall continue. Any president or managing officer of any bank who violates any of the provisions of this section shall forfeit to the State of California the sum of one hundred dollars a day for each and every day such violation shall continue. For the purposes of this section all deposits received by any bank under the provision of section thirty-one or section thirty-one a of this act shall be deemed to have been

deposited with such bank at the time the deposit was made with the bank from which the deposit was transferred; *provided*, that any bank which shall make any deposit with the state treasurer in conformity with the provisions of this section shall not thereafter be liable to any person for the same and any action which may be brought by any person against any bank for moneys so deposited with the state treasurer shall be defended by the attorney general without cost to such bank.

Statutes of California 1915, Chapter 608, page 1106.



SUPREME COURT OF THE UNITED STATES.

No. 154.—OCTOBER TERM, 1943.

Anderson National Bank, Suing on Behalf of Itself and All Others Similarly Situated, Appellants,

vs.

J. E. Lockett, Individually and as Commissioner of Revenue of the State of Kentucky, etc., et al.

Appeal from the Court of Appeals of the State of Kentucky.

[February 28, 1944.]

Mr. Chief Justice STONE delivered the opinion of the Court.

Under Kentucky Revised Statutes of 1942, ch. 393, §§ 393.060 *et seq.*, every bank or trust company in the state is required to turn over to the state, deposits which have remained inactive and unclaimed for specified periods. The questions for decision are: (1) whether the statute under which the state purports to acquire the right to demand custody of the deposits, affords due process of law, even though the depositors may not receive personal notice of the pending transfer and there may be no prior judicial proceedings, and (2) whether the statute, as applied to deposits in a national bank, conflicts with the national banking laws or is an unconstitutional interference by the state with appellant's operations as a banking instrumentality of the United States.

So far as here relevant, the provisions of the statute may be summarily stated as follows. Demand deposits held by a bank, with accrued interest, are presumed abandoned unless the owner has, within ten years preceding the date for making the report required by § 393.110, negotiated in writing with the bank, or been credited with interest on his passbook at his request, or had a transaction noted upon the books of the bank, or increased or decreased the amount of his deposit (§ 393.060). Non-demand deposits, with accrued interest, are likewise presumed abandoned, unless the owner, within the twenty-five years preceding the report, has taken one or more of such enumerated actions (§ 393.070).

The holder of property presumed abandoned, including any national bank, is required to file with the state Department of Reve-

nue, annually before September 1, a report in duplicate of such property as of the preceding July 1; the copy is sent to the sheriff of the county in which the property is located, and he is under the statutory duty of posting the copy on the court house door or bulletin board, before the following October 1 (§ 393.110(1)). The holder is required to turn over to the Department of Revenue before November 15, the property so reported, unless the holder or owner certifies facts to rebut the presumption of abandonment, or unless the statute of limitations has run as between the owner and the holder. In neither such case need the holder turn over the property except upon an order of court. If a claimant has filed an action with respect to any such property, the holder is required to notify the Department of the pendency of the action but is not required to turn over the property during its pendency. (§ 393.110(2).) In any case the holder of such property is entitled to a judicial determination of his rights, under § 393.160, providing for appeals from the decisions of the Commissioner of Revenue, or under § 393.230, providing for an equitable action by the Commissioner to compel the surrender of such property (§ 393.110(3)).

A person refusing to turn over property under this statute is subject to a penalty of 10% of its amount, but not to exceed \$500; he is subject to no penalty, however, if he posts a compliance bond (§ 393.290). Any person who transfers property to the State under this statute is relieved of liability to the owner, and the State is required to reimburse the holder for any such liability (§ 393.130).

The Commissioner may institute judicial proceedings to establish conclusively that property, in his hands because presumed abandoned, is actually abandoned, or that the owner of the property has died and that there is no person entitled to it (§ 393.230(2)). In such an action the procedure is governed by the Kentucky Civil Code of Practice (§ 393.240(2)).

A claim to property surrendered to the state may be made at any time, unless the property has been judicially determined, under § 393.230, to have been actually abandoned, in which case any claim to the property by a person not actually served with notice and who did not appear and whose claim was not considered during the proceeding, must be made within five years of the judicial determination (§ 393.140(1) and (2); and see *Anderson Nat. Bank v. Reeves*, 293 Ky. 735, 738, 741). The claimant is required to make publication of his claim in a newspaper of general

circulation in the county, or if there is none, he is required to post his claim at the court house door and at three other conspicuous places in the county (§ 393.140(3)). The Commissioner of Revenue is directed to consider and determine the validity of any claim and any defense; if he approves the claim, he must authorize its payment (§393.150). Judicial review of his determination in the appropriate state courts is provided (§ 393.160).

The statute thus sets up a comprehensive scheme for the administration of abandoned bank deposits. Upon a report by the bank and notice to the depositors and with an opportunity to be heard, if either wish it, the state takes into its protective custody bank accounts which, having been inactive for at least ten years if demand accounts, or at least twenty-five years if non-demand, the statute declares to be presumptively abandoned. The bank is relieved of its liability to the depositors, who receive instead a claim against the state, enforceable at any time until the deposits are judicially found to be abandoned in fact and for five years thereafter. Refusal by the designated state officer to make payment is reviewable by the state courts.

Appellant, a national banking association organized under the laws of the United States, brought the present suit in the Circuit Court of Kentucky for Franklin County. The bill of complaint, filed by appellant on behalf of itself and all others similarly situated, sought to enjoin appellees, the state Commissioner of Revenue and other state officers, from enforcing the statute here in question. The Circuit Court held invalid so much of the challenged statute as requires the payment of deposits to the state merely on the prescribed notice, and without the order or judgment of a court of competent jurisdiction. It gave judgment perpetually enjoining appellees from enforcing such parts of the statute. The Kentucky Court of Appeals sustained the Act in its entirety, holding that it affords due process, and that it neither infringes the national banking laws nor is a prohibited interference with a banking instrumentality of the United States. It accordingly reversed the judgment of the Circuit Court, and instructed it to deny an injunction. 293 Ky. 735. On remand, the Circuit Court entered its judgment, dismissing the bill. The Court of Appeals affirmed. 294 Ky. 674. The case comes here on appeal under § 237(a) of the Judicial Code, 28 U. S. C. § 344(a).

Appellant contends here: (1) that the statute, in requiring payment of the deposit accounts to the state on the prescribed notice, without recourse to judicial proceedings or any court order or judgment, deprives the depositors and appellant of property without due process of law, and (2) that such withdrawal of accounts from a national bank infringes the national banking laws, particularly R. S. § 5136, 12 U. S. C. § 24, which authorize national banks to accept deposits and to do a banking business, and is an unconstitutional interference with the federally authorized function of national banks as instrumentalities of the Federal Government.

I.

Appellant argues that the statute deprives both the bank and the depositors of their property rights in the bank accounts, and contends that the procedure by which the state acquires its asserted right to demand payment of the accounts is so lacking in notice to depositors and in an opportunity for them to be heard as to deny the state the right to assert the depositors' claims and afford to the bank no protection if it responds to the state's demand for payment of the accounts.

While the Kentucky statute is entitled "Escheats", its provisions, so far as applicable to bank deposits, are concerned only with personal property deemed abandoned. At common law, abandoned personal property was not the subject of escheat, but was subject only to the right of appropriation by the sovereign as *bona vacantia*. See 7 Holdsworth, A History of English Law (2d ed.) 495-496. Like rights of appropriation, except so far as limited by state law and the Fourteenth Amendment, exist in the several states of the United States. *Hamilton v. Brown*, 161 U. S. 256; *Christianson v. King County*, 239 U. S. 356; *Security Bank v. California*, 263 U. S. 282; *United States v. Klein*, 303 U. S. 276.

Apart from questions which may arise under the national banking laws in the case of national banks, it is no longer open to doubt that a state, by a procedure satisfying constitutional requirements, may compel surrender to it of deposit balances, when there is substantial ground for belief that they have been abandoned or forgotten, *Security Bank v. California*, *supra*, certainly when the state acquires them subject to all lawful demands of the depositors. *Provident Savings Institution v. Malone*, 221 U. S. 660.

The deposits are debtor obligations of the bank, incurred and to be performed in the state where the bank is located, and hence

are subject to the state's dominion. See *Security Bank v. California*, *supra*, 285 and cases cited; *Irving Trust Co. v. Day*, 314 U. S. 556, 562. And it is within the constitutional power of the state to protect the interests of depositors from the risks which attend long neglected accounts, by taking them into custody when they have been inactive so long as to be presumptively abandoned, see *Provident Savings Institution v. Malone*, *supra*, 664, just as it may provide for the administration of the property of a missing person. *Cunnius v. Reading School District*, 198 U. S. 458; *Blinn v. Nelson*, 222 U. S. 1.

With respect to the statutory rebuttable presumption of abandonment of demand deposits after inactivity of ten years and of non-demand deposits after inactivity of twenty-five years, we are unable to say that the legislative determination is without support in experience. We have sustained like statutory presumptions that shorter periods of inactivity furnish the basis for state administration of unasserted claims or demands. See *Security Bank v. California*, *supra*; *Cunnius v. Reading School District*, *supra*; *Blinn v. Nelson*, *supra*; cf. *Provident Savings Institution v. Malone*, *supra*.

In the present posture of the case we conclude, subject to the requirements of procedural due process, that prior to a judicial decree of actual abandonment, the depositors will not be deprived of their property by the surrender of their bank accounts to the state. We need not decide whether the procedure for determining abandonment in fact conforms to due process, for appellant has not attacked this procedure here and no such proceeding is before us. Prior to such a decree the present statute merely compels the summary substitution of the state for the bank, as the debtor of the depositors. It deprives the depositors of none of their rights as creditors, preserving their right to demand from the state payment of the deposits, and their right to resort to the courts if payment is refused. True, payment over of the deposits to the state may be the precursor of a decree of abandonment and the shortening of the period within which a claimant may demand payment of his deposit. But, if the notice to depositors is adequate, we cannot say that the period of five years allowed for that purpose after the decree, is an infringement of constitutional rights. *Terry v. Anderson*, 95 U. S. 628, 632-633, and cases cited; *United States v. Morcha*, 245 U. S. 392, 397.

Appellant and the Comptroller of the Currency, as *amicus curiae*, point to the formalities with which the depositors must comply before they will be able to recover their deposits, and argue that the state *may* be less solvent or less willing to pay than the bank. In the absence of some persuasive showing, which is lacking here, that these formalities will be more onerous than those which would or could be properly required by the bank, or that the state *will* in fact be less able or less willing to pay, it cannot be assumed that the mere substitution of the state as the debtor will deprive the depositors of their property, or impose on them an unconstitutional burden. See *Dohany v. Rogers*, 281 U. S. 362, 366-368; cf. *Blinn v. Nelson*, *supra*, 7; *Corn Exchange Bank v. Commissioner*, 280 U. S. 218, 223. In the absence of a showing of injury, actual or threatened, there can be no constitutional argument. *In re 620 Church St. Corp.*, 299 U. S. 24, 27, and cases cited.

Since the bank is a debtor to its depositors, it can interpose no due process or contract clause objection to payment of the claimed deposits to the state, if the state is lawfully entitled to demand payment, for in that case payment of the debt to the state, under the statute, relieves the bank of its liability to the depositors. *Security Bank v. California*, *supra*, 285, 286. But if the statute is deficient in its provisions for notice and opportunity for hearing so that the depositors would not be bound by any proceedings taken under it, the bank would be entitled to raise the question whether its obligation to the depositors would be discharged by payment of the deposits to the state. Hence our inquiry must be directed to the question whether the procedure by which the state undertakes to acquire the depositors' right to demand payment of the deposits was upon adequate notice to them and opportunity for them to be heard.

As we have said, the statute provides for notice to the depositors by requiring the sheriff to post on the court house door or bulletin board a copy of the bank's report of deposits presumed abandoned. We think that this, in conjunction with the notice provided by the statute itself and by the taking of possession of the bank balances by the state, is sufficient notice to the depositors to satisfy all requirements of due process.

The statute itself is notice to all depositors of banks within the state, of the conditions on which the balances of inactive accounts

will be deemed presumptively abandoned, and their surrender to the state compelled. All persons having property located within a state and subject to its dominion must take note of its statutes affecting the control or disposition of such property and of the procedure which they set up for those purposes. *Reetz v. Michigan*, 188 U. S. 505, 509; *North Laramie Land Co. v. Hoffman*, 268 U. S. 276, 283. Proceedings for the assessment of taxes, the condemnation of land, the establishment of highways and public improvements affecting land owners, are familiar examples. *Huling v. Raw Valley Railway & Improvement Co.*, 130 U. S. 559, 563-564; *Ballard v. Hunter*, 204 U. S. 241, 254-257, 262.

The report of the bank, required to be posted on the court-house door or bulletin board, lists the abandoned accounts as defined by the statute and thus gives notice to the owners of all those accounts which, because of their inactivity for the periods and in the ways specified by the statute, are deemed abandoned and required to be paid to the state. This notice, when read in the light of the knowledge of the statute, with which all persons having such bank accounts within the state are chargeable, is sufficient to advise that the listed accounts are deemed presumptively abandoned and will at the end of six weeks from the date of filing be paid over to the state, and that both before and after that event the depositors will be afforded opportunity to present their claims and to have them judicially determined, if rejected.

Posting on the court house door as a method of giving notice of proceedings affecting property within the county, is an ancient one and is time-honored in Kentucky. The Act of the Kentucky legislature of December 19, 1796, provided in § 2 for the use of this method of warning absent defendants in equity proceedings that a decree would be entered against them, if they did not appear. This means of giving notice was employed in the escheat statutes of Kentucky at least as early as 1852. Kentucky Revised Statutes of 1852, p. 308, c. 34, Art. IV, § 3(1). The fact that a procedure is so old as to have become customary and well known in the community is of great weight in determining whether it conforms to due process, for "Not lightly vacated is the verdict of quiescent years". *Coler v. Corn Exchange Bank*, 250 N. Y. 136, 141, aff'd, *sub nom. Corn Exchange Bank v. Commissioner*, *supra*. To that effect, see *Otis Co. v. Ludlow Mfg. Co.*, 201 U. S. 140, 154.

Ownbey v. Morgan, 256 U. S. 94, 108-109, 112; *Jackman v. Rosenbaum Co.*, 260 U. S. 22, 31; *Corn Exchange Bank v. Commissioner*, *supra*, 222-223; *Snyder v. Massachusetts*, 291 U. S. 97, 110-111.

We cannot say that the posting of a notice on the door of the court house in a Kentucky county is a less efficacious method of giving notice to depositors in banks of the county than publication in a local newspaper, or that in the circumstances of this case it is an inadequate means of giving notice of the summary taking into custody of the designated bank accounts by the state. This is the more so because in this case the notice is the immediate prelude to and accompanies the compulsory surrender of the bank balances to the state, unless the depositors in the meantime intervene as claimants. The statutory procedure, so far as it affects depositors, is in the nature of a proceeding in rem, in the course of which property, against which a claim is asserted, is seized or sequestered, and held subject to the appearance and presentation of claims by all those who assert an adverse interest in it. In all such proceedings the seizure of the property is in itself a form of notice of the claim asserted, to those who may claim an interest in the property. See *Corn Exchange Bank v. Commissioner*, *supra*, holding constitutional a statute providing for no notice to the owner of a bank deposit other than its seizure.

Security Bank v. California, *supra*, was a proceeding to compel the bank to pay over to the state inactive bank accounts as the first step in their sequestration and, if unclaimed, their possible ultimate escheat. The Court held, 263 U. S. at 289-290, that publication of notice of the proceeding in a newspaper at the state capital was sufficient notice to absent depositors to meet due process requirements. It supported this conclusion by reference to the proceeding against the bank by which it was required to pay over the deposits to the state "as in personam so far as concerns the bank; as quasi in rem so far as concerns the depositors", 263 U. S. at p. 287. Since the service of process on the bank personally was equivalent to a seizure of the accounts, it was deemed to supplement the publication as an independent notice, in itself, to the depositors of the seizure and of their opportunity given by the statute to appear and assert their claims against the state.

Like procedure, begun by the seizure or acquisition of control of a res, including, in some cases, choses in actions, has been sustained as affording adequate notice to absent claimants in escheat

proceedings, *Hamilton v. Brown*, *supra*; *Christianson v. King County*, *supra*, 373; in garnishment proceedings, *Harris v. Balk*, 198 U. S. 215, 223; in proceedings for the administration of a debt due an absentee, *Cunnius v. Reading School District*, *supra*; in proceedings begun by attachment, *Cooper v. Reynolds*, 10 Wall. 308; and in admiralty proceedings, *The Mary*, 9 Cranch 126, 144.

We cannot say, nor does appellant seriously urge, that the length of notice by posting, six weeks, is inadequate. Three weeks notice by publication of the condemnation of the land for a public highway was held sufficient by this Court in *North Laramie Land Co. v. Hoffman*, *supra*; and thirty days was deemed sufficient in a like proceeding in *Huling v. Kaw Valley Railway & Improvement Co.*, *supra*.

What is due process in a procedure affecting property interests must be determined by taking into account the purposes of the procedure and its effect upon the rights asserted and all other circumstances which may render the proceeding appropriate to the nature of the case. *Davidson v. New Orleans*, 96 U. S. 97, 107-108; *Ballard v. Hunter*, *supra*, 255; *North Laramie Land Co. v. Hoffman*, *supra*, 282-283; *Dohany v. Rogers*, *supra*, 369, and cases cited. The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked. If that is preserved, the demands of due process are fulfilled. Measured by this standard, we cannot say that the present notice is insufficient.

For this reason also it is not an indispensable requirement of due process that every procedure affecting the ownership or disposition of property be exclusively by judicial proceedings. Statutory proceedings affecting property rights, which, by later resort to the courts, secure to adverse parties an opportunity to be heard, suitable to the occasion, do not deny due process. Familiar examples are the decisions and orders of administrative agencies which determine rights subject to a subsequent judicial review. And such is obviously the case here, where there is full opportunity to the depositors to be heard by the State Commissioner, whose decision is subject to court review. It is difficult to see what right here asserted would have been better preserved by a court procedure whose end was the compulsory surrender of the deposit balances by the bank to the state, which takes subject to the claims of the depositors.

The mere fact that the state or its authorities acquire possession or control of property as a preliminary step to the judicial determination of asserted rights in the property is not a denial of due process. *Samuels v. McCurdy*, 267 U. S. 188, 200; *North Laramie Land Co. v. Hoffman*, *supra*; *Corn Exchange Bank v. Commissioners*, *supra*; *Phillips v. Commissioner*, 283 U. S. 589, 593-601, and cases cited.

We conclude that the procedural provisions of the Kentucky statute are adequate to meet all constitutional requirements, and that it does not deprive appellant or its depositors of property without due process of law.

II

We come now to appellant's second contention, that the Kentucky statute infringes the national banking laws and unconstitutionally interferes with appellant as an instrumentality of the federal government. But the statute does not discriminate against national banks, cf. *McCulloch v. Maryland*, 4 Wheat. 316, by directing payment to the state by state and national banks alike, of presumptively abandoned accounts. Nor do we find any word in the national banking laws which expressly or by implication conflicts with the provisions of the Kentucky statutes. Cf. *Davis v. Elmira Savings Bank*, 161 U. S. 275.

This Court has often pointed out that national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions. *Waite v. Dowley*, 94 U. S. 527, 533; *First National Bank v. Missouri*, 263 U. S. 640, 656; *Lewis v. Fidelity Co.*, 292 U. S. 559, 566; *Jennings v. United States Fed. & G. Co.*, 294 U. S. 216, 219. Thus the mere fact that the depositor's account is in a national bank does not render it immune to attachment by the creditors of the depositor, as authorized by state law. Compare *Earle v. Pennsylvania*, 478 U. S. 449, with *Van Reed v. People's National Bank*, 198 U. S. 554.

As we have seen, a bank account is a chose in action of the depositor against the bank, which the latter is obligated to pay in accordance with the terms of the deposit. It is a part of the mass of property within the state whose transfer and devolution is subject to state control. *Security Bank v. California*, *supra*, 285, 286, and cases cited; *Irving Trust Co. v. Day*, *supra*, 562.

It has never been suggested that non-discriminatory laws of this type are so burdensome as to be inapplicable to the accounts of depositors in national banks.

The statute here attacked does not purport to do more than does any other regulation of the devolution of bank accounts of missing persons, a function which is, as we have seen, within the competence of the state. Under the statute the state merely acquires the right to demand payment of the accounts in the place of the depositors. Upon payment of the deposits to the state, the bank's obligation is discharged. Something more than this is required to render the statute obnoxious to the federal banking laws. For an inseparable incident of a national bank's privilege of receiving deposits is its obligation to pay them to the persons entitled to demand payment according to the law of the state where it does business. A demand for payment of an account by one entitled to make the demand does not infringe or interfere with any authorized function of the bank. In fact, inability to comply with such demands is made a basis in the national banking laws for closing the doors of the bank and winding up its affairs.

Appellant argues that if the present act is sustained, it will open the door to the exertion of unlimited state discretionary power over the deposits in national banks, and that the act imposes a burden on appellants such as was held to be inadmissible in *First National Bank v. California*, 262 U. S. 366, which was followed in *National City Bank v. Philippine Islands*, 302 U. S. 651. As we have seen, the only power sought to be exerted by the state over the depositors' accounts is the assertion of its lawfully acquired right to collect them, in accordance with the obligation which was both assumed by appellant and is to be performed in conformity with the banking laws of the United States. In this respect the state's power to make such a demand cannot extend beyond its power under state law and the Federal Constitution to acquire control of deposit accounts from their owners. So long as it is thus limited, and the power is exercised only to demand payment of the accounts in the same way and to the same extent that the depositors could, we can perceive no danger of unlimited control by the state over the operations of national banking institutions. We need not decide whether within this limit, the state's power over deposits in national banks is as simple as its like power over deposits in state banks. Compare *First National Bank v.*

California, supra, with *Security Bank v. California, supra*. We are concerned only with the question whether the particular power here asserted is a forbidden encroachment upon the privileges of a national bank.

The decision of this Court in *First National Bank v. California, supra*, did not rest on any want of power of a state to demand of a national bank, payment of deposits which the state was lawfully entitled to receive. Decision there turned rather on the effect of the state statute in altering the contracts of deposit in a manner considered so unusual and so harsh in its application to depositors as to deter them from placing or keeping their funds in national banks. In that case the state brought a statutory proceeding in its courts to compel a national bank to pay over to it an inactive deposit account. The statute required "escheat to the state" of all balances in deposit accounts remaining unclaimed and inactive for more than twenty years, where neither the depositor nor any claimant had filed any notice with the bank showing his present address. It authorized suit in behalf of the state to recover such amounts and directed that judgment should be given for the state "if it be determined that the moneys deposited in any defendant bank or banks are unclaimed", for the period and in the manner specified by the statute. It will be noted that the statute required no proof that the forfeited accounts had been in fact abandoned, or that their owners were unknown or had died without heirs or surviving kin. Upon mere proof of dormancy for the prescribed period, the statute declared the accounts to be escheated to the state.

After pointing out that the state Supreme Court, in sustaining the judgment in the state's favor, had declined, as unnecessary to its decision, to express an opinion whether the absent depositors could reclaim their forfeited deposits from the state, this Court declared that the statute "attempts to qualify in an unusual way agreements between national banks and their customers long understood to arise when the former receive deposits under their plainly granted powers." 262 U. S. at p. 370. And since it was thought that such alterations might be made by that and other states, "and, instead of twenty years, varying limitations may be prescribed—three years perhaps, or five, or ten, or fifteen", the Court declared that the effect on the national banking system would be incompatible with the statutory purposes of establishing

a system of national banks acting as federal instrumentalities. That effect it specifically described as follows (p. 370): "The depositors of a national bank often live in many different States and countries; and certainly it would not be an immaterial thing if the deposits of all were subject to seizure by the State where the bank happened to be located. The success of almost all commercial banks depends upon their ability to obtain loans from depositors, and these might well hesitate to subject their funds to possible confiscation".

The unusual alteration of depositors' accounts to which the Court referred was plainly the statutory declaration of escheat of depositors' accounts merely because of their dormancy for the specified period, without any determination of abandonment in fact. This it treated as in effect "confiscation" of depositors' accounts, operating as an effective deterrent to depositors' placing their funds in national banks doing business within the state.

We have no occasion to reconsider this decision, as appellees urge, for the grounds assigned for it are wholly wanting here. While the seizure and escheat or forfeiture for mere dormancy of a national bank account are unusual, the escheat or appropriation by the state of property in fact abandoned or without an owner is, as we have seen, as old as the common law itself. Here there is no escheat or forfeiture by reason of dormancy. Dormancy without more is made the statutory ground for the state's taking inactive bank accounts into its custody, the state assuming the bank's obligation to the depositors. And the deposits need not be surrendered, if the depositors or the bank make it appear that abandonment has not occurred. This is not confiscation or even an attempted deprivation of property. Escheat or forfeiture to the state may follow, but only on proof of abandonment in fact. We cannot say that the protective custody of long inactive bank accounts, for which the Kentucky statute provides, and which in many circumstances may operate for the benefit and security of depositors, see *Provident Savings Institution v. Malone*, *supra*, 664, will deter them from placing their funds in national banks in that state. It cannot be said that it would have that effect, more than would the tax laws, the attachment laws, or the laws for the administration of estates of decedents or of missing or unknown persons, which a state may maintain and apply to depositors in national banks.

Nor are we able to discern any greater or different effect so far as prospective depositors in national banks are concerned, from the application of the ancient law of escheat or forfeiture of goods as *bona vacantia*, to bank accounts found to be without an owner, or to have been in fact abandoned by their owners. Compare *United States v. Klein, supra*. True, under the Kentucky statute, as in the case of an attachment or the administration of the estate of a deceased depositor, a change in the dominion over the accounts will ensue, to which the bank must respond by payment of them on lawful demand. But this, as we have said, is nothing more than performance of a duty by the bank imposed by the federal banking laws, and not a denial of its privileges as a federal instrumentality. In all this we can perceive no denial of constitutional right and no unlawful encroachment on the rights and privileges of national banks.

Since Kentucky may enforce its statute requiring the surrender to it of presumptively abandoned accounts in national as well as state banks, it may, as an appropriate incident to this exercise of authority, require the banks to file reports of inactive accounts, as the statute directs. *Waite v. Dowley, supra*; *Colorado Bank v. Bedford*, 310 U. S. 41, 53.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.